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13
No. 2410

United States
Circuit Court of Appeals
For the Ninth Circuit.

BENSON LUMBER COMPANY, a Corporation,
Plaintiff in Error,

vs.

H. C. McCANN, by JESSE F. McCANN, His Guard-
ian ad Litem,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

JUL - 1 1914

F. D. Monckton,
Clerk.

No. 2410

United States
Circuit Court of Appeals
For the Ninth Circuit.

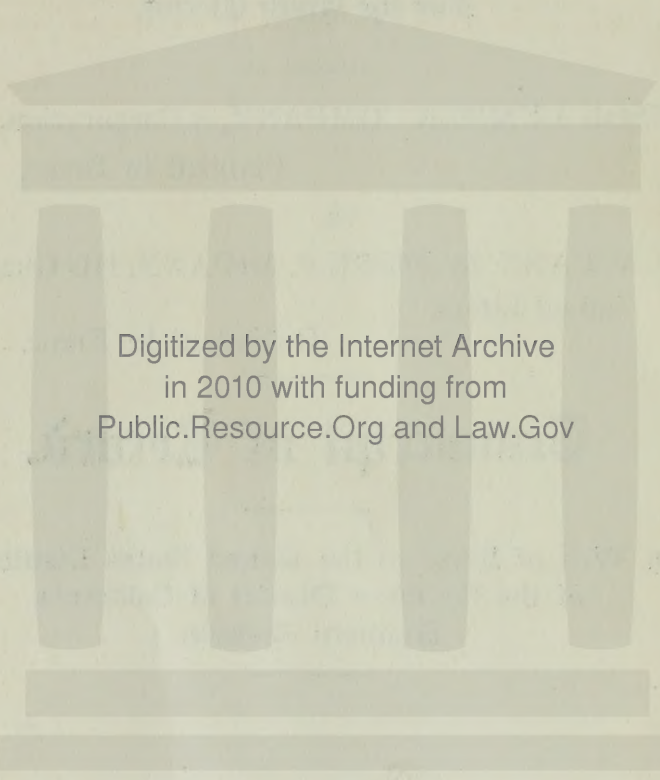
BENSON LUMBER COMPANY, a Corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

Messrs. GIBSON, DUNN & CRUTCHER, 718
Pacific Electric Building, Los Angeles, California;

Messrs. WRIGHT & WINNEK, 817-820 Timken Building, San Diego, California.

For Defendant in Error:

Messrs. HUNSAKER & BRITT, 1132 Title Insurance Building, Los Angeles, California;

Messrs. HAINES & HAINES, Timken Building, San Diego, California. [4*]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States for the Southern District of California,
Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a cause which is in the said District Court before you wherein the Benson Lumber Company, a corporation, is plaintiff in error, and H. C. McCann, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

*Page-number appearing at foot of page of original certified Record.

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 25th day of March, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 24th day of February, in the year of our Lord, One Thousand Nine Hundred and Fourteen.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, for
the Southern District of California, Southern
Division.

By R. S. Zimmerman,
Deputy. [5]

The above writ of error is hereby allowed.

OLIN WELLBORN,
Judge.

I hereby certify that a copy of the within writ of error was on the 24th day of February, 1914, lodged in the clerk's office for the Southern Division, of the

Southern District of California, for the said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of
California.

By Chas. N. Williams,
Deputy Clerk. [6]

[Endorsed]: C. C. No. 1478. Dept. No. In
the U. S. District Court, Southern District of California,
Southern Division. H. C. McCann, by Jesse F. McCann,
his Guardian *ad Litem*, Plaintiff, vs. Benson Lumber
Company, Defendant. Writ of Error. Filed Feb. 24, 1914.
Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. [7]

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

To H. C. McCann, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 25th day of March, 1914, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, for the Southern District of California, Southern Division, in that certain action No. C. C. 1478, wherein the Benson Lumber Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said Benson Lumber Company, in the said writ of error mentioned, should not be cor-

rected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable OLIN WELLBORN, United States District Judge, for the Southern District of California, this 24th day of February, 1914, and of the Independence of the United States the one hundred and thirty-eighth.

OLIN WELLBORN,
United States District Judge, for the Southern District of California. [8]

Due service of the foregoing citation in the cause therein mentioned, upon the defendant in error therein, is hereby admitted this 26 day of February, 1914.

HUNSAKER & BRITT and
HAINES & HAINES,

Attorneys for Defendant in Error. [9]

[Endorsed]: C. C. No. 1478. Dept. No. In the District Court of the United States, Southern District of Cal., State of California. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Company, Defendant. Citation. Filed Mar. 5, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [10]

**[Certificate of Clerk to Transcript of Record on
Removal.]**

*In the District Court of the United States of
America, in and for the Southern District of
California, Southern Division.*

C. C. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guard-
ian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant. [11]

I, William H. Francis, County Clerk and ex-officio Clerk of the Superior Court in and for the County of San Diego, State of California, hereby certify that the within papers are a true and correct copy of the records in the said Superior Court in the case of H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. The Benson Lumber Company, a Corporation, Defendant, and that the within papers are a true and correct copy of the complaint, demurrer, petition for removing the said cause from the said Superior Court of the County of San Diego, State of California, to the Circuit Court of the United States, for the Southern District of California, in the 9th Circuit, of the bond filed with said petition and of the order for said removal.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said Court this 6th day of January, 1909.

[Seal]

WM. H. FRANCIS,
County Clerk, and ex-officio Clerk of the Superior
Court, San Diego, Calif.

By W. Wirt Francis,
Deputy. [12]

*In the Superior Court of the County of San Diego,
State of California.*

H. C. McCANN, by JESSE F. McCANN, His Guardian
ad Litem,

Plaintiff,

vs.

BENSON LUMBER COMPANY (a Corporation),
Defendant.

Complaint.

H. C. McCann, the plaintiff above named, appearing by Jesse F. McCann, his guardian *ad litem*, for cause of action against the Benson Lumber Company, the defendant above named, states:

I.

That on the 29 day of July, 1908, the said Court duly made and gave its order, by which it appointed Jesse F. McCann as guardian *ad litem* for plaintiff to represent him in said action.

II.

That the defendant Benson Lumber Company is a corporation duly organized under the laws of the State of Oregon and having its principal place of business in the city of Portland, Oregon. That de-

fendant has at all times herein mentioned maintained and owned, and still maintains and owns, a mill for the sawing and working up of logs into lumber; that said mill is situated upon the Bay of San Diego, California, but within the corporate limits of the city of San Diego, California, and near the southwesterly end of Beardsley Street of said city, otherwise known as South Twenty-second street, in said city.

III.

That during all the time herein mentioned in carrying out [13] the process of sawing logs and converting the same into lumber by defendant in its said mill, the logs were first sawed lengthwise into various dimensions.

Next the lengths of lumber so cut were delivered from the log carriage sidewise and easterly, in constant succession, to and upon a platform, or table about twenty-two feet long by ten wide, extending lengthwise along the easterly side of said mill and along an opening in such side for the full length of said platform. Said platform is hereinafter referred to as table "A."

That below said table "A" and crosswise of it at intervals of two feet along its entire length were circular revolving saws so constructed that one or more of the same at a time could by the person in charge of them, hereinafter designated as the "trimmer," at his discretion be caused to project up through the top of said table and to saw crosswise all boards and lumber forced against such saws; and that for the purpose of cutting such boards

and lumber as delivered from the log carriage into proper lengths for use, such boards and lumber were carried by machinery as fast as they came from the log carriage sidewise across said table from west to east and against said saws, and that after being thereby sawed into the lengths required, such boards and lumber were dropped from the easterly side of said table "A" through said opening in the easterly wall of said mill. That east of the easterly wall of said mill, and along the same and about four feet distant therefrom and directly opposite said opening therein through which said boards and lumber were so dropped, and directly opposite said table "A" were constructed and placed two other platforms or tables, to receive said lumber as so continuously delivered from said table "A." [14]

The one such platform or table hereinafter designated as table "B" was about four feet wide and ten and a half feet long; and that it was set so that its northerly end was on a line with the northerly end of said table "A" and extended southward parallel to and four feet eastward from said table "A."

The other such platform or table hereinafter designated as table "C" was about eight feet wide and fifteen feet long; and that it was set so that its north end was about one and one-half feet south of said table "B," and extended its length southward, likewise parallel to said table "A" and four feet eastward from it. That while the westerly sides of the said tables "B" and "C" were on the same line, and said uniform distance of four feet from the eastern edge of said table "A," the said table

“C” projected easterly about eight feet further than said table “B.” That said table “B” was constructed so as *to about* two feet higher than said table “C.” That between the easterly edge of said table “A” on the one side and said tables “B” and “C” on the other, for a width from west to east of about said four feet and for a distance from north to south equal to the combined length of said tables “B” and “C” was a chute or slide inclined downward toward said tables “B” and “C,” and also sloping from south to north; but that at all points opposite said tables “B” said chute was lower than the surface of either of said tables. That the surface of said table “A” at its easterly side is three feet, more or less, higher than the surface of said table “B” and five feet more or less higher than the surface of said table “C,” and that from west to east over the surface of said table “A” at its easterly edge and the surface of said tables “B” and “C” at their respective westerly edges and across said open space or chute at intervals from north to south of about three feet were placed pairs of cross-timbers hereinafter described as “skids”; the two members of each pair of such skids being about one foot apart. [15]

That after being sawed upon said table “A” into the lengths required and dropped therefrom through the said opening in the easterly wall of said mill such lumber so sawed is and was at times herein mentioned and according to the common practice at said mill allowed to slide sidewise across and down said skids and to and upon said tables “B”

and "C"; and that in so sliding down and across said "skids" to and upon said tables, the pieces of lumber sawed upon said table "A" to a greater length than from twelve to fourteen feet so fell upon said tables "B" and "C" as to lie partly on the one and partly on the other; and pieces of lumber sawed to a shorter length fell indifferently upon said table "B" *on* said table "C."

That under said table "B" and extending cross-wise on it up through openings in its surface to a height of about one inch above its surface were constructed four revolving rollers, to wit, one extending across said table "B" near its northerly edge, one extending across said table "B" near its southerly edge, and two extending across said table "B" between said northerly and southerly rollers. That according to the custom and practice at said mill said rollers were caused constantly so to revolve as to carry in constant succession the boards and lumber so falling on said table "B" from north to south along and off said table "B" and to and upon said table "C," and by means of endless chains upon said table "C" lumber falling directly upon said table "C" was caused to move easterly on said table "C" and upon reaching the easterly edge of said table "C" such boards and lumber were seized, removed and piled upon trucks by workmen in charge of said tables "B" and "C."

That the southmost roller on said table "B" herein after referred to as the "dog-roller" is thickly studded with rounded projections of steel known and described as "dogs" one and one-half [16]

inches or thereabouts high and about three-eighths of an inch each in diameter. That said dog-roller at all times herein mentioned occupied the south end of said table "B" and that the extreme southerly edge of said table was at all times herein mentioned formed by a heavy plank, set edgewise, hereinafter described as plank "X," extending from below upward to a height slightly lower than that of the general surface of the said table "B." That said plank "X" was at all times herein mentioned fastened immediately south of said dog-roller and so near thereto that when said dog-roller revolved, the dogs or projections thereon cleared said plank by only half an inch or thereabouts.

That at all times herein mentioned said arrangements for distributing the boards and lumber dropped from said table "A" through the said opening in the easterly wall of said mill were subject to complication and disorder as follows: That boards and lumber cut to shorter lengths, in sliding down said "skids" from said table "A" toward said table "B" or said table "C," at times fell between said "skids" and stood on end, in a perpendicular or partially perpendicular position with one end projecting into such open chute and between two pairs of said "skids"; and that such boards and lumber at times so fell in a nearly horizontal position between pairs of said skids that one end fell upon said table "B" or said table "C" as the case might be, thereby causing boards and lumber to be accumulated and piled up upon said table "B" or on said

table "C" and obstructing the process of removing the same therefrom.

3.

That at all times herein mentioned all of the operations of said mill outside of the said mill building were entrusted by the defendant corporation to the immediate charge of a yard foreman. That said foreman had charge among other things of [17] said tables "B" and "C" and the attendants thereon. That it was the practice of said yard foreman when obstructions occurred in any of the ways hereinbefore mentioned upon said table "B" either himself to climb up upon said table to remove the same, or to direct or allow some one of said attendants so to do, of all which defendant was fully informed. That said yard foreman and said defendant were familiar with the practice of so doing and never protested against the same but had prior to the 30 day of July, 1907, often observed said practice and been thoroughly familiar therewith and approved thereof; and that the defendant corporation had theretofore provided the attendants about said table "C" with hooks attached to short handles for the express purpose of being used in so handling the lumber upon said table "B" and "C."

That at all times herein mentioned under the supervision and instructions of said yard foreman and with the knowledge and approval of defendant it had been the practice of the attendants in charge of said tables "B" and "C," whenever lumber became so clogged and piled up upon said table "B," under the orders of said yard foreman, to climb upon said

table "B" and by hand to remove the obstructions thereon and particularly to remove any boards or lumber that might have become caught or wedged between or under said "skids," and that the only practicable means for cleaning away such clogging was so to do. That by reason of the number of rollers on said table "B," and of the mechanism therewith connected, as well as by reason of the height of said table, it was commonly impracticable, and was on said 30 day of July, and at the time plaintiff suffered the hereinafter mentioned injuries, impracticable, for the attendants in charge of said table to climb directly from the ground upon said table "B."

That consequently it was at all times herein mentioned the [18] only feasible way, and the common practice, at said mill when such clogging occurred, in order to clear the same, to mount upon said table "B" from said table "C" by stepping from said table "C" over and across said dog-roller, all of which was at all times well known to defendant's agents, foreman, said yard foreman, and to the superintendent placed by the defendant in charge of said mill, and to the defendant.

But that it was never the practice of defendant at said mill to stop the sawing and the stream of lumber from said table "A," or to stop the rollers upon said table "B," to give opportunity to safely remove the obstructions constantly arising through the unavoidable occurrence of jams and accumulations of lumber thereon; and that defendant at all times herein mentioned negligently failed to provide

suitable apparatus for stopping said rollers; but that the same could only be stopped by communicating with the engine-room of said mill and causing the same to be stopped from there. That at no time herein mentioned could said tables "B" and "C," or either of them, or any of the attendants in charge thereof, be seen from said engine-room; nor did defendant at any time provide the said attendants about said table "B" and "C" or any of said attendants with any means of having said rollers or machinery stopped, except by such communication with said engine-room, and to cause said machinery to be stopped required five minutes or thereabouts. That at all times herein mentioned it was the ordinary practice at said mill to allow lumber to drop from said table "A" and to continue to slide down said "skids" to and upon said tables "B" and "C" and to allow said rollers on said table "B" including the said "dog-roller" to continue to revolve, notwithstanding such jams, obstructions and accumulations of lumber on, under or between said "skids" and on said tables, and notwithstanding that at the same time [19] attendants were or might be upon said table "B," endeavoring to remove such obstructions and accumulations of lumber; all of which was at all times exceedingly dangerous and perilous, and to defendant, its agents, foreman, yard foreman, and superintendent well known to be thus dangerous and perilous.

That on the said 30 day of July, 1907, plaintiff was of the age of seventeen years and three and a half months, and was in the employ of said defendant

as one of the attendants in charge of said tables "B" and "C," and was as such attendant under the immediate supervision of said yard foreman, and together with the other attendants was charged by said defendant, by its yard foreman, with the duty of removing lumber and boards as the same from time to time reached the east side of said table "B," and was also charged by defendant, by its said yard foreman, with the duty of seeing that the lumber and boards dropped from said table "A" should be so carried across said table "B" or from said respective tables "C" and "B" as ultimately to reach said east end of table "C," there to be removed in the manner aforesaid. That it was particularly made, by defendant through its said yard foreman, the duty of plaintiff and said other attendants to prevent any disorder or complication in said operations, and particularly to prevent the clogging of the same in any manner.

That plaintiff had been so employed as one of the attendants about said tables "B" and "C" during the two weeks immediately preceding the hereinafter mentioned accident, and that two weeks before its occurrence and while plaintiff was by defendant so employed a board had been caught under one of the pairs of said "skids" and had caused a clogging, accumulation and jam of lumber upon said table "B," and that said yard foreman, being then present, then and there directed plaintiff [20] to "get up and get that out," then and there referring to said board there so caught, and had then and there intentionally given plaintiff to understand that plain-

tiff was required by defendant company, as often as and whenever such clogging should occur, or boards be so caught between or under said "skids," to mount up upon said table "B," and amid the falling boards and between the revolving rollers thereon, and to disentangle and remove the boards and lumber so caught or that might become so caught; and that thereupon and in the presence of such yard foreman, and under his express orders, the plaintiff had then and there climbed upon said table "C" and stepped therefrom over said "dog-roller," and to and upon said table "C" and removed and disentangled the lumber then and there caught.

That on said 30 day of July, 1907, and in the course of the operation of said mill, a certain board was sawed to a length of six feet or thereabouts and was delivered from said table "A" and upon the "skids" extending from said platform to said table "B." That in sliding down said skids and by reason of the shortness of said board one end of the same fell between two pairs of said "skids" in such manner that said end of said board became caught in one of said pairs of "skids" while the other end of said board fell across said table "B" and one of the rollers thereon, and became wedged in that position, and thereby formed an obstruction to the passage of other lumber along or off said table "B" to and upon said table "C" and caused lumber to pile up and accumulate upon said table "B" and form a jam there.

That when said board became caught as aforesaid on said 30 day of July, 1907, there was no ladder or

other ready or available means of climbing from the ground directly to or upon said table "B"; but that the only practicable way for a workman or attendant to get upon or reach the top of said table "B" [21] was to climb upon said table "C" and to step thence across the space intervening between the said table "C" and said table "B" and across and over said "dog-roller" to and upon said table "B," in the same manner in which plaintiff had done two weeks or thereabouts theretofore as hereinbefore set forth. That accordingly, on said 30 day of July, 1907, plaintiff, in the performance of his duty to keep said table "B" free from obstruction, upon observing said board so caught and wedged in the position aforesaid, climbed up upon said table "C" and undertook and attempted to step therefrom across and over said "dog-roller" and to and upon said table "B," there to clear away said board so caught and wedged beneath said "skids"; but that plaintiff, without fault on his part, failed in the effort to step over said "dog-roller" and said plank "X," and that then and there, and while he was endeavoring so to do, his right foot was carried between said "dog-roller" and said plank "X" and so crushed and maimed as to necessitate the amputation of all of same save the heel and ankle only.

That at the time plaintiff was so injured said yard foreman was not present nor in sight of said table "B," nor of said table "C" nor of plaintiff. That plaintiff at the time of said injury was inexperienced in the use of machinery, and by reason of his tender years and such inexperience did not realize or un-

derstand the danger incident to attempting to step or climb over said "dog-roller" or upon said table "B" in the manner aforesaid or to attempt to perform the work so assigned to him by said defendant's said yard foreman.

And that at the time of said accident and notwithstanding the complication caused upon said table "B" by the catching of said board and while plaintiff was seeking as aforesaid to climb and step from said table "C" over said "dog-roller" to [22] said table "B," boards and lumber continued constantly to drop from said table "A" down across said "skids" to and upon both said table "B" and said table "C."

That defendant at all times herein mentioned was grossly negligent as foresaid in failing to provide plaintiff, as aforesaid, with a safe place to work; and by causing plaintiff to be about and upon said apparatus and machinery without providing fit and proper safeguards therefor, and by and through its yard foreman in allowing plaintiff, who was then and there a minor as aforesaid, to believe that the services so required of him were ordinary and safe, whereas the same were in fact fraught with great and extraordinary danger.

That by reason of the premises plaintiff was compelled to be and remain at a hospital and sanitarium for a period of five weeks immediately following said 30 day of July, 1907, and for necessary board, lodging and treatment at said hospital and sanitarium and for surgical and medical aid thereat and atten-

tion, including the cost of the amputation of plaintiff's said right foot, plaintiff incurred liability for the reasonable sum and amount of \$485.

That by reason of said injury plaintiff was for a long time, to wit, six months or thereabouts immediately following said 30 day of July, 1907, unable to perform any work or labor whatsoever, and lost thereby the value of his time for such period of six months, to his damage in the sum of \$400.

That by reason of said injury, plaintiff has become lame and crippled and will so remain during the whole of his natural life, and that his capacity for earning a livelihood has become thereby greatly impaired and diminished and will continue to be and remain so impaired and diminished, and that he has been by said injury subjected to great pain and suffering in body and mind, all to his damage in the sum of \$25,000. [23]

WHEREFORE, plaintiff demands judgment against defendant for the sum and amount of \$25,885, and costs herein.

HAINES & HAINES,
Attorneys for Plaintiff.

State of California,
County of San Diego,—ss.

H. C. McCann, being duly sworn, says: That *he the* plaintiff named in the foregoing complaint; that he has read said complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters

that he believes it to be true.

JESSE F. McCANN,
Guardian for Plaintiff, H. C. McCann.

Subscribed and sworn to before me this 30th day
of July, 1908, by H. C. McCann.

[Seal] JNO. P. BURT,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: No. 14,693. Dept. No. In the
Superior Court of the State of California, in and for
the County of San Diego. H. C. McCann, by Jesse
F. McCann, His Guardian *ad Litem*, Plaintiff, vs.
Benson Lumber Company, a corporation, Defendant.
Complaint. (Copy.) Filed July 30, 1908, Wm. H.
Francis, County Clerk. By J. B. McLees, Deputy.
Haines & Haines, Attorney for Plaintiff. Gibson,
Trask, Dunn & Crutcher, Entrance Room 718 Pacific
Electric Building, Cor. 6th and Main Sts., Los An-
geles, Cal., Attorneys for [24]

*In the Superior Court of the State of California, in
and for the County of San Diego.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,
Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Demurrer.

Now comes defendant in the above-entitled action

and demurs to the complaint herein, and for grounds of demurrer states:

I.

That the complaint herein does not state facts sufficient to constitute a cause of action.

GIBSON, TRASK, DUNN & CRUTCHER,
WRIGHT, SCHOONOVER & WINNEK,
Attorneys for Defendant.

[Endorsed]: No. Dept. No. In the Superior Court of County of San Diego, State of California. H. C. McCann, by Jesse F. McCann, Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Co., Defendant. Demurrer. Filed Jan. 5, 1909. Wm. H. Francis, Co. Clerk. By J. B. McLees, Deputy. Received copy of the within demurrer this 5th day of January, 1909, Haines & Haines, Attorneys for Plaintiff. Gibson, Trask, Dunn & Crutcher, Entrance Room, 718 Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendant. [25]

*In the Superior Court of the State of California, in
and for the County of San Diego.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Petition [for Removal].

To the Honorable, the Superior Court of the County of San Diego, State of California:

Your petitioner, the Benson Lumber Company, a corporation, the defendant in the above-entitled action, respectfully shows, and your petitioner respectfully avers:

I.

That your petitioner in the above-named action was at the time of the commencement of this action, and ever since has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and was at the time of the commencement of this action, and ever since continuously has been, and now is, a citizen and resident of the said State of Oregon.

II.

That this action was commenced on the twenty-sixth day of December, 1908, in the said Superior Court of the County of San Diego, State of California.

III.

That the summons, together with a copy of the complaint in said action, was served on petitioner, in the city of San Diego, county of San Diego, and State of California, on the twenty-sixth day of December, 1908, and not before.

IV.

That under and by virtue of the laws of the State of California [26] and the rules of the said Superior Court, your petitioner, defendant in this ac-

tion, always has been and is required to appear, answer and plead to the complaint in said action, within ten days after the service of summons in the said action, that is to say, on or before the fifth day of January, 1909, and not before.

V.

That your petitioner has not in any manner answered, demurred or plead to the said action; that no issue of fact or law has been raised or joined thereon, and that the time allowed by law and the rules of the said Superior Court of the County of San Diego, State of California, for your petitioner to demur, answer or plead therein, has not expired and will not expire until the fifth day of January, 1909; and that simultaneously with the filing of this petition, your petitioner has filed in the said action and served on the attorneys for plaintiff its demurrer in writing to the complaint therein.

VI.

That this suit always has been and is one of a civil nature, in law, of which the Circuit Courts of the United States attain jurisdiction, by the Act of Congress of the United States, entitled An Act to correct the enrollment of an Act approved March 3d, 1887, entitled An Act to amend sections 1, 2, 3 and 10 of an Act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from State Courts, and for other purposes, approved March 3d, 1875, approved August 13th, 1888; that this action is now pending in the said Superior Court of the County of San Diego, State of California, and that the matter in dispute

therein exceeds, exclusive of interest and costs, the sum and value of two thousand dollars, that is to say, the action is brought to recover the sum of twenty-five thousand eight hundred and eighty-five dollars, besides costs. [27]

VII.

That the plaintiff herein was at the time of the commencement of this action, ever since continuously has been and now is a citizen and resident of the city of San Diego, in the county of San Diego, in the State of California, and that the guardian *ad litem* of plaintiff, Jesse F. McCann, was at the time of the commencement of this action, ever since continuously has been, and now is a resident and citizen of the said county of San Diego in the State of California; and that your petitioner, the defendant herein, was at the time of the commencement of this action, even since continuously has been, and now is, a corporation organized and existing under the laws of the State of Oregon, and was at the time of the commencement of this action, ever since continuously has been, and now is, a resident of the said State of Oregon, and was at the time of the commencement of this action, ever since continuously has been, and now is, a citizen of the said State of Oregon; and that this action at the time of its commencement, was, ever since continuously has been, and now is, a controversy between citizens of different States, to wit, a controversy between your petitioner, the defendant herein, a citizen of the said State of Oregon, and the plaintiff *here*, a citizen of the State of California.

VIII.

That there was at the time of the commencement of this action, ever since continuously has been, and now is, a controversy herein which always has been and now is wholly between citizens of different States, which can be fully determined as between them; that such controversy always has been, during all said last-mentioned times, and now is, between the plaintiff, a citizen of the State of California, aforesaid, and your petitioner, the defendant, a citizen and resident of the said State of Oregon, as aforesaid, and that the plaintiff, and his guardian *ad* [28] *litem*, as aforesaid, and your petitioner, are the only parties to this action.

IX.

That this petition is made and filed before your petitioner ever has been or is required by law, or by any law of the State of California, or by any rule of the said Superior Court of the County of San Diego, in the State of California, in which this suit is brought and is pending, to appear, or demur, or answer, or plead to the declaration or complaint of plaintiff herein, and your petitioner desires to remove the same from the said Superior Court to the Circuit Court of the United States for the Southern District of California, in the Ninth Judicial Circuit, the same being the district in which this suit has always been and now is pending; that pursuant to the provisions of the Act of Congress of the United States, approved March 3d, 1887, entitled, An Act to amend the Act of Congress approved March 3d, 1875, entitled, An Act to determine the jurisdiction

of the Circuit Courts of the United States and to regulate the removal of causes from State Courts, and for other purposes, and to further regulate the jurisdiction of the Circuit Courts of the United States, and for other purposes, and all acts explanatory and amendatory thereof, and to correct the same, and particularly An Act approved August 13th, 1888, to correct the enrollment of said Act of March 3d, 1887; and that your petitioner is ready and willing to give all good and sufficient surety which this Court may direct, and to do all such acts and things as may be required to be done by the provisions of the said Acts of the Congress of the United States, on the removal of a suit into a court of the United States.

X.

That your petitioner has made and filed with this petition and hereby offers herewith a good and sufficient surety, according [29] to the provisions of the said Acts of Congress, and bond, made and executed by the National Surety Company, a corporation, duly organized and existing under and by virtue of the laws of the State of New York, and duly licensed for the purpose of making, guaranteeing and becoming surety upon bonds and undertakings required or authorized by the laws of the State of California, as surety, in the sum of one thousand dollars, conditioned that your petitioner shall enter in the Circuit Court of the United States for the Southern District of the State of California, in and for the Ninth Judicial Circuit on the first day of the session next ensuing hereafter, a copy of the record in said suit, and shall pay all costs that the said Court shall

award, if the said Court shall hold that this suit was improperly or wrongfully removed thereto.

THEREFORE, your petitioner prays this Honorable Court to accept this petition and said bond, and to proceed no further herein, except to make an order of removal, the cause and record herein to be removed into the Circuit Court of the United States for the Southern District of California, in the Ninth Judicial Circuit.

And your petitioner will ever pray, etc.

BENSON LUMBER COMPANY,

By O. J. EVENSON,

Its. Vice-Pres.

GIBSON, TRASK, DUNN & CRUTCHER,

WRIGHT, SCHOONOVER & WINNEK,

Attorneys for Petitioner. [30]

State of California,

County of San Diego,—ss.

O. J. Evenson, being first duly sworn, on oath deposes and says that he is an officer, to wit, the vice-president, of the Benson Lumber Company, a corporation, and defendant in the above-entitled action; that he has read the foregoing petition in the said action, and knows the contents thereof, and that the same is true of his own knowledge, except in matters that are therein stated on information and belief, and that as to such matters he believes it to be true.

O. J. EVENSON.

Subscribed and sworn to before me this 5th day of January, A. D. 1909.

[Seal]

E. V. WINNEK,

Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: No. 14,693. Dept. No. 1. In the Superior Court of County of San Diego, State of California. H. C. McCann, by His Guardian *ad Litem*, Jesse F. McCann, Plaintiff, vs. Benson Lumber Co., Defendant. Petition for Removal to Cir. Ct. U. S. Filed Jan. 5, 1909. Wm. H. Francis, Co. Clerk. By J. B. McLees, Deputy. Gibson, Trask, Dunn & Crutcher, Entrance Room, 718 Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendant. [31]

*In the Superior Court of the State of California, in
and for the County of San Diego.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Bond on Removal of Cause.

KNOW ALL MEN BY THESE PRESENTS:
WHEREAS, the defendant in the above-entitled action, the Benson Lumber Company, a corporation, is about to apply to the above-entitled court to remove the said action to the Circuit Court of the United States for the Southern District of California, and

for further proceedings, on the grounds in said petition set forth, and asking that all further proceedings in the said Superior Court be stopped; and desires this bond for the purposes of said proceedings, according to the statute relative to the removal of causes from State to Federal Courts;

NOW, THEREFORE, in consideration of the premises and of the making of such application to remove the said cause, the undersigned, the National Surety Company, a corporation duly organized under and by virtue of the laws of the State of New York, and duly licensed for the purpose of making, guaranteeing, and becoming surety upon bonds and undertakings required or authorized by the laws of the State of California, as surety, does hereby undertake and promise, on the part of the said Benson Lumber Company, a corporation, petitioner, to remove the above-entitled action to the said Circuit Court of the United States for the Southern District of California, that the said petitioner will [32] enter and file in the said Circuit Court of the United States, on or before the first day of the next ensuing session of the said Court, a transcript of the record in said Superior Court, in the above-entitled action, and that said defendant and petitioner will pay all costs to be paid or costs that may be awarded therein, in the said Circuit Court of the United States aforesaid, if the said Circuit Court shall hold that the said suit was wrongfully or improperly removed thereto, not exceeding the sum of one thousand dollars, for which amount the undersigned, National Surety Company, acknowledges itself and its successors

jointly and severally bound by these presents.

IN WITNESS WHEREOF, the National Surety Company has caused its name to be hereunto subscribed, and its seal to be hereunto affixed, by representatives thereunto duly authorized, this 4th day of January, A. D. 1909.

[Corporate Seal]

NATIONAL SURETY COMPANY,

By CHAS. SEYLER, Jr.,

Resident Vice-President,

SAM BEHRENDT,

Resident Secretary.

State of California,

County of Los Angeles,—ss.

On this 4th day of January, A. D. 1909, personally, before me, a notary public in and for the said county of Los Angeles, in the State of California, duly commissioned and sworn, appeared Charles Seyler, Jr., and Sam Behrendt, known to me to be the resident vice-president and resident assistant secretary respectively of the National Surety Company, a corporation, who executed the within instrument, and acknowledged to me that the said National Surety Company executed the same, and that they subscribed the name of the said National Surety Company thereto, as principal; and the said Charles Seyler, Jr., and Sam Behrendt, [33] being first duly sworn, did depose and say that they reside in the city of Los Angeles, county of Los Angeles, State of California, and that they are respectively the resident vice-president and resident assistant secretary of the said

National Surety Company; that they know the corporate seal of said company; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the foregoing bond is the corporate seal of said company and was thereto affixed by order and authority of the Board of Directors of said Company and that they signed their names thereto by like order and authority of the board of directors of said company; that the assets of said company, unencumbered and liable to execution exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of one thousand dollars.

CHAS. SEYLER, Jr.,
Resident Vice-President.
SAM BENRENDT,
Resident Asst. Secretary.

Sworn to and acknowledged before me, and subscribed in my presence, this January 4th, 1909.

[Seal] EDWIN J. LOEB,
Notary Public in and for the County of Los Angeles,
State of California.

The above bond and surety thereon are hereby accepted and approved, this 5th day of January, 1909.

W. R. GUY,
Judge.

[Endorsed]: No. ——. Dept. No. ——. In the Superior Court of County of San Diego, State of California. H. C. McCann, by Jesse F. McCann,

Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Co., Defendant. [34] Bond on Removal. Filed Jan. 5, 1909. Wm. H. Francis, Co. Clerk. By J. B. McLees, Deputy. Gibson, Trask, Dunn & Crutcher, Entrance Room, 718 Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendant. [35]

*In the Superior Court of the State of California, in
and for the County of San Diego.*

H. C. McCANN by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Order [of Removal].

It appearing that the defendant in the above-entitled action has filed its petition in due form therein for the removal of said cause to the Circuit Court of the United States for the Southern District of California, for the Ninth Circuit, and has also filed a bond in due form, on said removal, for the sum of one thousand dollars, with due and sufficient surety, duly approved by this Court,—

IT IS ORDERED, that no further proceedings be taken in the said cause, and that same be removed accordingly.

Dated, January 6th, 1909.

W. R. GUY,
Judge.

[Endorsed]: Entered in Minutes. No. 14,693. Dept. No. 1. In the Superior Court of County of San Diego, State of California. *H. C. McCann*, by *Jesse F. McCann*, Guardian *ad Litem*, Plaintiff, vs. *Benson Lumber Co.*, Defendant. Order for Removal of Cause to U. S. Cir. Ct. Filed Jan. 6, 1909. *Wm. H. Francis*, Co. Clerk. By *W. Wirt Francis*, Deputy. *Gibson, Trask, Dunn & Crutcher*, Entrance Room 718 Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendant. [36]

[Endorsement in U. S. Circuit Court]: No. 1478. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. *H. C. McCann*, by *Jesse F. McCann*, His Guardian *ad Litem*, vs. *Benson Lumber Company*. Certified Transcript on Removal from Superior Court of San Diego County. Filed Jan. 7, 1909. *Wm. M. Van Dyke*, Clerk. *Chas. N. Williams*, Deputy. [37]

[Order on Demurrer.]

At a stated term, to wit, the January Term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Monday, the nineteenth day of April, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1478.

H. C. McCANN by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

This cause coming on this day to be heard on defendant's demurrer to plaintiff's complaint, James Stark Bennett, Esq., appearing on behalf of plaintiff's counsel, and defendant being representing by Gibson, Trask, Dunn & Crutcher, and said demurrer having been presented by counsel for defendant, and court thereupon, at the hour of 12:15 o'clock P. M., having taken a recess until the hour of 2:15 o'clock P. M. of this day, and now, at the hour of 2:15 o'clock P. M., Court having reconvened, and counsel being present as before, and said demurrer having been further argued on behalf of defendant, said demurrer is now confessed by counsel for plaintiff, whereupon it is ordered by the Court, that plaintiff have twenty (20) days' time in which to amend his said complaint.

[Endorsed]: Filed Sep. 18, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [38]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

**Amended Complaint for Damages for Personal
Injuries.**

Comes now the plaintiff above named, by Jesse F. McCann, his guardian *ad litem*, and by leave of Court first had and obtained, files this his amended complaint, and, for cause of action against the defendant above named alleges:

1. That plaintiff, H. C. McCann, is a minor of the age of nineteen years. That on the 29th day of July, 1908, the Superior Court of the County of San Diego, State of California, duly made and entered its order in and by which it appointed said Jesse F. McCann guardian *ad litem* for plaintiff H. C. McCann, for the purposes of conducting this action.

2. That defendant, Benson Lumber Company, at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the city of Portland in said State. That at all of said times said defendant maintained,

owned and operated, and still maintains, owns and operates at the city of San Diego, State of California, a mill and yard, with machinery, chutes and platforms for sawing and converting, and [39] was engaged in sawing and converting logs into lumber and disposing of the same.

3. That at all times herein mentioned said mill was so constructed and operated by defendant that as the lumber in said mill was cut into lengths, defendant caused the same to pass sideways from said mill down a chute made of parallel skids leading from the sawing table in said mill to the outside platform, and defendant maintained and caused to operate and revolve in the surface of said outside platform, rollers carrying dogs or projections for the purpose of carrying said lumber lengthwise at right angles from the direction in which it came to the said outside platform until it dropped on to a loading platform, whence it was loaded on to wagons and carted away.

4. That on the 30th day of July, 1907, plaintiff H. C. McCann was of the age of 17 years and 3 months, or thereabouts, and, at said time, he was in the employ of said defendant as an attendant upon and about said outside platform. That in the course of his said employment plaintiff was required and directed by defendant to keep said lumber moving over said chute from said mill and along said outside platform and to see to it that said lumber did not clog, jam or pile up in said chute and on said outside platform. That whenever said lumber did clog, jam or pile up in said chute and on said outside platform, plaintiff, in the course of said employment, was re-

quired by defendant to go upon said outside platform while the said rollers were in operation and revolving on the surface of said platform and to loosen and disentangle the said lumber which had become so clogged and piled up, and to again start and keep said lumber moving along said chute and said outside platform.

5. That on the said 30th day of July, 1907, said outside platform was a dangerous and unsafe place in which to work, that defendant maintained said outside platform in a defective [40] and unsafe condition, without exercising ordinary or any care to see that the same was a reasonably safe place for said plaintiff to work and without providing fit and proper safeguards therefor. That at said times defendant maintained said chute in a defective and unsafe condition, without exercising ordinary or any care to see that it did not render unsafe the place defendant had provided for plaintiff to work in. That at said time defendant failed to use ordinary or any care to provide a safe way or safe appliances for the use of plaintiff in mounting and going upon said outside platform. That plaintiff did not know of the perils and dangers to which he was so exposed by defendant while doing his work as aforesaid, and defendant failed and neglected to warn plaintiff of the danger and peril to him incident to his said employment and work. That at said time defendant knew and had the means of knowing that said outside platform was an unsafe place for plaintiff to work in, that said chute rendered said outside platform an unsafe place in which to work, and that no safe way or safe appliances had been furnished for plaintiff's use in mount-

ing and going upon said outside platform.

6. That on said July 30, 1907, while plaintiff, in the course of his said employment, was mounting and going upon said outside platform to disentangle the lumber which was clogged, jammed and piled up on said outside platform, by reason of defendant's negligence in failing to provide for said plaintiff a reasonably safe place in which to work, by reason of defendant's negligence in failing to provide a proper and sufficient chute, by reason of said defendant's negligence in failing to provide proper ways and appliances for mounting and going upon said outside platform, by reason of defendant's negligence in failing to warn plaintiff of the danger connected with said employment, and by reason of defendant's negligence in failing to instruct plaintiff in what manner he could safely perform his [41] said duties, plaintiff was caught by said first roller revolving in the surface of said outside platform and thrown down on said outside platform, and his right foot torn, bruised, wounded and mangled, by reason of which injury plaintiff was required to and did have said right foot amputated.

7. That in consequence of the said injuries caused by the want of care and said negligence of defendant, as aforesaid, plaintiff has suffered great bodily pain and mental anguish, and has suffered the loss of his right foot, has become lame and crippled and will so remain permanently during the remainder of his natural life; that thereby his capacity for earning a livelihood has become impaired and diminished and will continue to remain so impaired and diminished,

to his damage in the sum of \$25,000.

8. That in consequence of said injuries caused by said want of care and negligence of defendant, as aforesaid, plaintiff was compelled to be and remain at a hospital and sanitarium for a period of five weeks immediately following said 30th day of July, 1907, and to incur, and did incur, liability for necessary board, lodging and treatment at said hospital and sanitarium, and for surgical and medical aid and attention thereat, in the sum of \$485.00. That the reasonable value of said board, lodging, treatment and surgical and medical aid and attention for which said liability was so incurred by plaintiff was and is said sum of \$485.00.

WHEREFORE, plaintiff demands judgment against defendant for the sum of \$25,485, and costs.

HUNSAKER, BRITT & FLEMING,
HAINES & HAINES,

Attorneys for Plaintiff. [42]

State of California,
County of San Diego,—ss.

H. C. McCann, being first duly sworn, deposes and says: That he is the plaintiff named in the foregoing amended complaint; that he has read said amended complaint and knows the contents thereof, and that the same is true to his own knowledge except as to those matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

H. C. McCANN.

[Seal] ISABEL S. SULLIVAN,
Notary Public in and for the County of San Diego,
State of California.

*In the Circuit Court of the United States, Ninth Cir-
cuit, in and for the Southern Division of the
Southern District of California.*

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Demurrer to the Amended Complaint.

Now comes the defendant in the action above entitled and demurs to the amended complaint of plaintiff on file herein, and for grounds of demurrer, shows:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said amended complaint is uncertain in this, that it is impossible to ascertain from said amended complaint how or in what manner the said platform was dangerous or unsafe or was a dangerous or unsafe place in which to work, or how or in what manner defendant maintained said platform in a dangerous condition, or how or in what manner defendant failed to exercise ordinary care to see that the same was reasonably safe, or how or in what manner defendant failed to use ordinary care or failed to furnish safe appliances for plaintiff, and that it is impossible to ascertain from said amended complaint how defendant could have guarded said platform or what appliances defendant [44] should have used to guard the same or to make the same safe.

III.

That said amended complaint is further uncertain in this, that it is impossible to ascertain from said amended complaint why or how plaintiff did not know of the said alleged dangers to which he was exposed, it not being alleged that the said dangers, if any at all, were concealed or of such character that a

person of plaintiff's years could not have seen or understood such dangers, and it not being alleged of what the dangers consisted.

IV.

That said amended complaint is further uncertain in this, that it is impossible to ascertain therefrom what appliances the defendant could have used or furnished to plaintiff to use in mounting the outside of said platform, which it did not furnish.

V.

That said amended complaint is ambiguous, in the same respects and for the same reasons, for which it is above shown to be uncertain.

VI.

That said amended complaint is unintelligible, in the same respects and for the same reasons for which it is above shown to be uncertain.

GIBSON, TRASK, DUNN & CRUTCHER,
Attorneys for Defendant.

[Endorsed]: No. 1478. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. H. C. McCann, etc., Plaintiff, vs. Benson Lumber Co., Defendant. Demurrer to the Amended Complaint. Filed May 24, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Received copy of the within demurrer this 24th day of May, 1909. Haines & Haines, and Hunsaker, Britt & Fleming, Plaintiff. Gibson, Trask, Dunn & Crutcher, Los Angeles, Cal., Attys. for Defendant. [45]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

**Second Amended Complaint for Damages for
Personal Injuries.**

Comes now the plaintiff above named, by Jesse F. McCann, his guardian *ad litem*, and by leave of Court first had and obtained, files this his second amended complaint, and for cause of action against the defendant above named, alleges:

1. That plaintiff, H. C. McCann, is a minor of the age of nineteen years. That on the 29th day of July, 1908, the Superior Court of the County of San Diego, State of California, duly made and entered its order in and by which it appointed said Jesse F. McCann guardian *ad litem* for plaintiff, H. C. McCann, for the purposes of conducting this action.

2. That defendant, Benson Lumber Company, at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the city of Portland, in said

State. That at all of said times said defendant maintained, owned and operated and still maintains, owns and operates at the city of San Diego, State of California, a mill and yard, with machinery, chutes and platforms for sawing and converting, and was engaged in sawing and converting, logs into lumber and disposing of the same. [46]

3. That at all times herein mentioned said mill was so constructed and operated by defendant that logs in continuous succession were delivered upon a carrier and carried by it backwards and forwards until cut into lumber by the great band-saw of said mill; that next such lumber was delivered by the connected machinery of the mill in continuous succession to a sawing-table inside of said mill known as the "trimmer," and there cut into lengths; and that defendant next caused the said lumber to be carried by further connected machinery of the mill from said "trimmer" sidewise in constant succession from said mill down a chute, otherwise known as the "slide," made of parallel skids leading from said "trimmer" in said mill downward to a platform outside of the mill, otherwise known as the "push-table"; that at all said times defendant, by further connected machinery of the mill, maintained and caused to operate and revolve in the surface of said "push-table" rollers including a roller studded with "dogs," projections or spikes for the purpose of carrying said lumber lengthwise at right angles from the direction in which it came sidewise, in unintermitting succession, to and upon said "push-table," until it dropped from said "push-table" two feet

or thereabouts, downward upon a loading table, otherwise known as the "carrying-table," whence it was loaded, as fast as delivered, by the employees of defendant upon wagons or trucks and carried away. That the whole process of converting logs into lumber, from the time when such logs in quick succession were delivered upon the carrier for the band-saw until the lumber cut from them was passed through said "trimmer" down said skids upon said "push-table" and over it upon said "carrying-table," and thence loaded upon trucks, was a continuous one; and that it was required by defendant, in its operation of its said mill, that such process should be continuous and uninterrupted throughout; that in order that such process should be so continuous [47] and uninterrupted, it was necessary to keep the lumber moving down said "slide," and over said "push-table" and upon said "carrying-table" and to prevent any accumulation, clogging or jamming of lumber, either upon said "slide," said "push-table," or said "carrying-table," and to have said lumber delivered regularly, so as to make it possible to keep a succession of trucks loaded therewith, and get the same out of the way. And plaintiff avers that at all said times such clogging, piling up and jamming of lumber was of frequent occurrence.

4. That on the 30 day of July, 1907, plaintiff, H. C. McCann, was of the age of 17 years and three months or thereabouts, and, at said time, he was in the employ of said defendant as an attendant upon and about said "slides" and said outside platform, so called the "push-table" and said loading platform,

so otherwise known as the "carrying-table."

That in the course of his said employment plaintiff was required and directed by defendant, and defendant made it part of his work, to keep said lumber moving on said chute or "slide" from said mill and along said outside platform, so otherwise known as the "push-table," and to see to it that said lumber did not clog, jam or pile up on said "slide" or on said "push-table," and to see that the lumber was kept moving in a continuous stream as delivered from the said "trimmer" inside of said mill upon said "slide" and thence downward upon said outside "push-table" and from it to said loading platform or "carrying-table."

That whenever said lumber so coming in a continuous stream did clog, jam, or pile up on said chute, otherwise called "the slide," or on said outside platform, otherwise called "the push-table," plaintiff, in the course of his employment, was required by defendant to go upon said outside "push-table" while said rollers were in operation and revolving on the surface of said platform, and while lumber was being delivered in a continuous [48] stream from the inside of the mill, to loosen and disentangle the said lumber, which had become so clogged and piled up, and to again start, and keep said lumber moving along in continuous stream down said "slide" and over said "push-table" down to and upon said loading platform, otherwise known as the "carrying-table"; that the defendant provided no other means for releasing, loosening or disentangling lumber when it became so clogged and piled up than for its

employees to get on and upon said "push-table" to there accomplish the releasing, loosening and disentangling of the lumber which had become so clogged and piled up. And that defendant at the time of the injury inflicted upon plaintiff as hereinafter stated had provided no other means for mounting upon said "push-table" than to step up and upon the same from said "carrying-table" over said "dog-roller," revolving at the end of said "push-table" next to said "carrying-table."

5. That on said 30 day of July, 1907, said outside platform or "push-table" was a dangerous and unsafe place on, in and with which to work; that defendant maintained said outside platform or "push-table" in a defective and unsafe condition, without exercising ordinary or any care to see that the same was a reasonably safe place for plaintiff to work, and without providing fit and proper safeguards therefor. That at said times defendant maintained said chute or "slide" in a defective and unsafe condition, without exercising ordinary or any care to see that it did not render unsafe the place defendant had provided for plaintiff to work in. That at said time defendant did not have or provide the inclined plane of said chute or "slide" with a sufficient number of skids or other device to properly carry the lumber from said mill to said outside platform or "push-table"; by reason of which accumulations, jams and clogs of lumber were liable to occur, and by reason of which said outside platform or "push-table" and said loading platform or "carrying-table" were [49] unsafe places at, on and about which to require plain-

tiff to work. That said outside platform or "push-table" was then and there further defective and unsafe in that defendant did not have or provide a reasonably safe place or means of approach thereto, or for mounting or going thereon, or to protect plaintiff from said "dog-roller." That at said time said outside platform or "push-table" was a dangerous and unsafe place at, on or about which to require plaintiff to work, by reason of the fact that defendant then and there operated said mill, chute or "slide," and said outside platform or "push-table," without requiring said rollers to be stopped and without interrupting the stream of lumber pouring out from said "trimmer" while the lumber clogged, jammed and piled upon said outside platform or "push-table" was or could be loosed and released. That the loosening and releasing of the lumber, when so clogged, piled up and jammed, was required to be done when said mill was in full operation as aforesaid; that great noise and confusion were attendant upon such full operation; and that the work and labor of loosening and releasing the lumber when so clogged, jammed and piled up required extreme and desperate haste, and the exercise of great and violent muscular exertion, and under said circumstances was of an extremely distracting character; that said work was in all respects unsuitable in character and under said circumstances under which it was performed, for anyone, and particularly for a youth of the plaintiff's age and experience. That at said time defendant failed to use ordinary or any care to provide a safe way or safe appliances for the use of plaintiff

in mounting and going upon said outside platform or "push-table." That plaintiff, being then and there a youth as aforesaid, had no experience of, and did not know of, the perils and dangers to which he was so exposed by defendant while doing his work as aforesaid, and that defendant failed and neglected [50] to warn plaintiff, notwithstanding his said youth and inexperience, of the dangers and perils to him incident to his said employment and work; but with full knowledge of plaintiff's youth and inexperience and of said circumstances, carelessly, negligently and recklessly required plaintiff to expose himself to said perils and dangers. That at said time defendant knew and had the means of knowing that said outside platform or "push-table" was an unsafe place for plaintiff to work in; that said chute or "slide" rendered said outside platform an unsafe place in which to work; that the uninterrupted stream and discharge of lumber from said mill rendered said work perilous and unsafe, and that no safe way or safe appliances had been furnished for plaintiff's use in mounting and going upon said outside platform, and that by reason of plaintiff's said youth and inexperience and the character of said work as aforesaid, he was peculiarly and especially exposed and liable to injury in the performing of his said work.

6. That on said July 30, 1907, while plaintiff was so employed, a large amount of lumber became clogged, jammed and piled up between the skids of said "slide" and on said "push-table." That while plaintiff, in the course of his said employment, was

mounting and going upon said outside platform or "push-table" to disentangle the lumber which was so clogged, jammed and piled up on the said outside platform or "push-table," by reason of the dangerous character of the work as aforesaid, and of defendant's negligence in failing to provide for said plaintiff a reasonable safe place in which to work, by reason of defendant's negligence in failing to provide a proper and sufficient chute or "slide," by reason of said defendant's negligence in failing to provide ways and appliances for mounting and going upon said outside platform, by reason of defendant's negligence in exposing the *defendant*, being a youth as aforesaid, to the danger connected [51] with the said employment, by reason of defendant's negligence in failing to warn plaintiff of the danger connected with the said employment, and by reason of defendant's negligence in failing to instruct plaintiff in what manner he could safely perform his said duties, and by reason of plaintiff's neglect and failure to stop said rollers on said "push-table" while said lumber so piled, clogged and jammed was being released, and by reason of defendant's continuing the uninterrupted discharge of lumber upon said "push-table" while the lumber clogged, piled and jammed thereon, was so being released, plaintiff was caught by said "dog-roller," revolving in the surface of said outside platform or "push-table" and thrown down on said "push-table," and his right foot torn, bruised, wounded and mangled, by reason of which injury, plaintiff was required to and did have his right foot amputated.

7. That in consequence of the said injuries caused by the want of care and said negligence of defendant, as aforesaid, plaintiff has suffered great bodily pain and mental anguish, and has suffered the loss of his right foot, has become lame and crippled and will so remain permanently during the remainder of his natural life; that thereby his capacity for earning a livelihood has become impaired and diminished and will continue to remain so impaired and diminished, to his damage in the sum of \$25,000.

8. That in consequence of said injuries caused by said want of care and negligence of defendant, as aforesaid, plaintiff was compelled to be and remain at a hospital and sanitarium for a period of five weeks immediately following said 30th day of July, 1907, and to incur, and did incur, liability for necessary board, lodging and treatment at said hospital and sanitarium, and for surgical and medical aid and attention thereat, in the sum of \$485.00. That the reasonable value of said board, lodging, [52] treatment and surgical and medical aid and attention for which said liability was so incurred by plaintiff was and is said sum of \$485.00.

WHEREFORE, plaintiff demands judgment against defendant for the sum of \$25,485 and costs.

HUNSAKER, BRITT & FLEMING, and
HAINES & HAINES,

Attorneys for Plaintiff.

State of California,
County of San Diego,—ss.

Jesse F. McCann, being first duly sworn, deposes and says: That I am the person named in the fore-

going amendment to the second amended complaint as guardian *ad litem*; that I have read said amendment to said second amended complaint and know the contents thereof, and that the same is true of my own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters I believe it to be true.

JESSE F. McCANN.

Subscribed and sworn to before me this 26th day of June, 1909.

[Seal]

CHARLES C. HAINES,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: At Law. Original. No. 1478. In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Company, a Corporation, Defendant. Second Amended Complaint for Damages for Personal Injuries. Received a copy of the within this 28th day of June, 1909. Gibson, Trask, Dunn & Crutcher, Attys. for Deft. Filed Jun. 28, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Haines & Haines, San Diego, Cal., and Hunsaker, Britt & Fleming, Rooms 714-719 H. W. Hellman Building, Los Angeles, California, Attorneys for Plaintiff.
[53]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Demurrer to the Second Amended Complaint.

Now comes the defendant in the above-entitled action and demurs to the second amended complaint of plaintiff on file herein and for grounds of demurrer shows:

I.

That said second amended complaint does not state facts sufficient to constitute a cause of action.

II.

That said second amended complaint does not state facts sufficient to constitute a cause of action in this, that the same shows upon its face that the machinery and appliances therein mentioned and the dangers thereof, if any, were open and apparent; that plaintiff knew the dangers thereof, if any, as well as any person, or could have known thereof, by ordinary care, and comprehended, or could by ordinary care, have comprehended the same.

III.

That said second amended complaint is uncertain

in this, that it is impossible to ascertain therefrom in what manner or respect or how the said push-table or other appliances were defective or unsafe, or what defect there was therein, or in what manner the same were not reasonably safe or how or [54] in what manner defendant failed to use ordinary care or failed to furnish safe appliances for plaintiff, or how defendant could have guarded said appliances, or what appliances defendant should have used to guard the same or to make the same safe which it did not use.

IV.

That said amended complaint is further uncertain in this, that it is impossible to ascertain therefrom why or how plaintiff did not know of the said alleged dangers to which he was exposed, it not being alleged that the said dangers, if any at all, were concealed or of such character that a person of plaintiff's years could not have seen or understood such dangers.

V.

That said amended complaint is further uncertain in this, that it is impossible to ascertain therefrom what appliances defendant could have used or furnished to plaintiff to use in mounting the said push-table which it did not furnish.

VI.

That said amended complaint does not state facts sufficient to constitute a cause of action, in that it appears therefrom that plaintiff was not in the exercise of ordinary care.

VII.

That said amended complaint is ambiguous in the same respects and for the same reasons for which it is above shown to be uncertain.

VIII.

That said amended complaint is unintelligible in the same respects and for the same reasons for which it is above shown to be uncertain.

GIBSON, TRASK, DUNN & CRUTCHER,

Attorneys for Defendant. [55]

[Endorsed]: At Law. No. 1478. U. S. Cir. Ct., 9th Circuit, Southern Div., Southern Dist. of California. H. C. McCann, etc. vs. Benson Lumber Company. Demurrer to Second Amended Complaint. Received copy of the within demurrer this 10th day of July, 1909. Haines & Haines and Hunsaker, Britt & Fleming, Attys. for Plaintiff. Filed Jul. 10, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Gibson, Trask, Dunn & Crutcher, 718 Pacific Electric Building, Los Angeles, Cal. [56]

[Order Overruling Demurrer to Second Amended Complaint, etc.]

At a stated term, to wit, the July Term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Monday, the twelfth day of

July, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1478.

H. H. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY,

Defendant.

This cause coming on regularly on this day to be set down for trial, and it appearing that a demurrer has been interposed herein to plaintiff's second amended complaint, and W. J. Hunsaker, Esq., being present as counsel for plaintiff, and John H. Lathrop, Esq., being present as counsel for defendant, and said demurrer having been submitted to the Court for its consideration and decision upon the argument heretofore had herein on the demurrer to the amended complaint, it is now by the Court ordered, that said demurrer to the second amended complaint be, and said demurrer hereby is, overruled; it is further ordered, on motion of counsel for plaintiff and with the consent of counsel for defendant, that said cause be, and the same hereby is set down for trial on Tuesday, December 28th, 1909, at 10:30 o'clock A. M.

[Endorsed]: Filed Sep. 18, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [57]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Answer to Second Amended Complaint.

Now comes the said defendant in the above-entitled action and without waiving its demurrer filed herewith, and for answer to the second amended complaint on file herein:

I.

Defendant has no knowledge, information or belief sufficient to enable it to answer, as to whether or not plaintiff is a minor, of the age of nineteen years, or otherwise, and on said ground denies that plaintiff is such minor, of said age, or it a minor at all.

II.

Defendant denies that the drop from the said "push-table" to the said "carrying-table" was two feet or thereabouts, but alleges that the same was not over four feet downward and outward, so that the nearest edge of the said "carrying-table" to the nearest edge of the said "push-table" was not over

four feet downward and outward.

III.

Defendant has no knowledge, information or belief sufficient to enable it to answer as to whether or not plaintiff was, on the 30th day of July, 1907, of the age of seventeen years and three months, or thereabouts, and on said ground [58] denies that plaintiff was of said age of seventeen years and three months thereabouts, or was a minor, or was of any age under twenty-five years or thereabouts.

IV.

Defendant denies that whenever lumber might clog, jam or pile up on said chute, outside platform, or "push-table" or elsewhere, or at any time, plaintiff, either in the course of his said employment, or otherwise, was required by defendant to go upon said outside "push-table" or upon any table whatsoever, either while said rollers were in operation, or revolving, or otherwise, or at all, or while lumber was being delivered in continuous stream or otherwise from the inside of said mill or elsewhere, or at any time or at all, either to loosen or disentangle any lumber which may have become clogged or piled up, or to start the same, or to keep the same moving, or for any purpose or object whatsoever, or at all; and defendant denies that it had provided no other means for releasing, loosening or disentangling clogged or piled up lumber than for its employees or any thereof to get on or upon said "push-table" or there to accomplish such releasing, loosening or disentangling of such lumber, or otherwise; and defendant further answering admits that it had pro-

vided no means for mounting the said "push-table," and alleges that such push-table was not to be mounted by any of the defendant's servants, agents or employees, at any time while the said mill was in operation, and further alleges that if any person, servant, agent or employee of defendant should essay to mount the said push-table, although defendant did not expect, require or permit the same to be done, there were other and better and safer methods for mounting thereon than to step up or over or upon the same from the said carrying-table over the said dog-roller. [59]

V.

Defendant denies that on said 30th day of July, 1907, or at any other time, said outside platform or push-table was a dangerous or unsafe place, or a place whatsoever, on, in or with which to work, and on the contrary avers that the said push-table was not a place on which any employee or person whomsoever was required, expected or permitted to work; denies that it maintained said outside platform or push-table in a defective or unsafe condition, or that it did not exercise ordinary care in reference thereto, and denies that the said push-table was a place for plaintiff or any other employee of defendant or any person whatsoever to work, but alleges that the same was as safe as it was possible for a machine of its nature and kind to be; and denies that defendant failed to provide any safeguards which were fit or proper therefor; denies that it maintained said chute or slide in a defective or unsafe condition, or that it did not exercise ordinary care in reference thereto,

and denies that the said chute or slide rendered unsafe any place defendant had provided for plaintiff to work in, but alleges that the said slide was as safe as it was possible for an appliance of its nature and kind to be; denies that it did not have or produce, at said time or at any time, a sufficient number of skids or other device, for said chute or slide, properly to carry the lumber from said mill to said push-table, and denies that by reason of any lack of skids, or defect, or lack of proper devices, said accumulations, jams or clogs of lumber were liable to occur or said loading platform or carrying-table were rendered unsafe places at, on or about which to work; denies that said outside platform or push-table was then or there or at any time or place defective or unsafe in that [60] defendant had no reasonably safe place or means of approach thereto or for mounting or going thereon or to protect plaintiff or any person from the said dog-roller or otherwise, or at all, and in respect to said allegations of said second amended complaint defendant alleges that said push-table was not a place to be mounted, or for the doing of any work thereon, and that said dog-roller was not an appliance over or about which plaintiff or any other person whomsoever was expected, required or permitted to do any work whatsoever; and further defendant denies that there was no reasonably safe place or means of approaching or mounting the said push-table, although defendant alleges that there was no occasion or duty resting on plaintiff or any employee of defendant or any person whomsoever, to get on or work on said push-table,

at the time mentioned in said complaint, or at any time; denies that the loosening or releasing of lumber which might become clogged, piled up or jammed in any of the appliances mentioned in said complaint was required to be done when said mill was in full operation, but alleges that only such loosening and disentangling of such lumber as could be safely done, by the use of appliances furnished by defendant therefor, and without mounting upon either said push-table or said slides, was required or expected to be done without stopping the operation of said mill, and that any loosening or disentangling of such lumber which could not be so done, with such appliances so furnished by defendant, safely, and without mounting said push-table or slides, was by defendant expected, permitted and required only to be done by and after stopping the machinery of the said mill connected therewith; denies that great noise or confusion, or any confusion whatsoever, were attendant upon the full or any operation of said mill, or that the work or labor of loosening or releasing the said clogged, jammed or piled up lumber required [61] haste, either extreme, or desperate, or otherwise, or at all, or the exercise of great or violent muscular exertion or was, under such circumstances, or otherwise, of a distracting character, either extremely, or at all; denies that said work was, in any respect, unsuitable in character, or under the circumstances under which it was performed, or otherwise, for anyone, whether minor or adult, or for the plaintiff; denies that at said time, or at any time, defendant failed to use ordinary or any care to

provide a safe way or safe appliances for the use of plaintiff in mounting or going upon said outside platform or push-table, or that it failed to use ordinary care in any respect or in connection with any of the matters or things mentioned in said complaint, and denies that plaintiff was expected, permitted or required by defendant or any of its servants, agents or employees, to mount or go upon said push-table; denies that defendant had provided no safe way or safe appliance that could have been used in mounting said push-table, but inasmuch as said push-table was not a place where work was to be done, or which it was expected would be mounted, defendant denies that any duty rested on it to provide any means, way or appliances for the use of plaintiff or any person, to mount or go upon the same; denies that plaintiff had no experience of or did not know of the perils or dangers, if any there were, in doing the work for which he was employed or in which he was engaged; denies that defendant failed to warn said plaintiff of the dangers and perils to him incident to his said employment and work; denies that said plaintiff was either youthful or inexperienced, or that, with knowledge of any youth or inexperience of plaintiff or of any circumstances whatsoever, or otherwise, defendant [62] required plaintiff to expose himself to any perils or dangers whatsoever, either carelessly, negligently, or recklessly, or otherwise, or at all; denies that at said time or at any time whatsoever, the said outside platform or "push-table" was a place for plaintiff to work in, or in which he was expected, per-

mitted or required by defendant to work, whether unsafe as stated in said complaint or otherwise or at all, and denies that defendant knew or had means of knowing of the said push-table as a place, unsafe or otherwise, for plaintiff to work in; denies that said chute or slide, or anything whatsoever, rendered said outside platform an unsafe place in which to work, and denies that the said outside platform was a place at all in which work was permitted, required or expected by defendant to be done; denies that the discharge or stream of lumber from said mill rendered any work therein perilous or unsafe, and denies that plaintiff, either by reason of youth or inexperience or the character of his work, or otherwise, or at all, was exposed or liable to injury, peculiarly, especially, or otherwise, or at all, in the performing of his said work.

VI.

Defendant denies that on the said day mentioned in said complaint, or at any time, a large amount of lumber became clogged, jammed or piled up between said skids or elsewhere, as therein alleged; admits, however, that one or two pieces of lumber did become clogged between said skids; denies that plaintiff mounted or went upon said outside platform or push-table, at said time, or at any time, in the course of his said employment, either to disentangle any purpose whatsoever; and denies that [63] any lumber had then or there or elsewhere or at any time become tangled or jammed by reason of any dangerous character of any work in said mill; denies that any of the work in said mill was of a

dangerous character, or that plaintiff was not provided with a reasonably safe place in which to work, or that a proper or sufficient chute or slide was not provided, or that all proper ways and appliances were not provided, or that plaintiff, as a youth or otherwise, was exposed to any dangers by defendant, or that defendant failed to warn plaintiff of the dangers connected with said employment, if any, or that defendant failed to instruct plaintiff in what manner he could safely perform his said duties, or that defendant was negligent in either or any of the matters or things in said second amended complaint contained or specified, or otherwise; denies that by reason of any act or acts, fault, carelessness, omission or negligence of defendant or any of its servants, agents or employees, except said plaintiff, said plaintiff sustained any injury whatsoever; denies that any injuries which plaintiff may have received were caused by said rollers on said push-table not being stopped at any time or by reason of defendant's continuing the operation of said mill; and specially denies that plaintiff sustained injuries or damage in the sum of \$25,000 or in any other sum or amount whatsoever; and defendant avers that plaintiff was fully informed and instructed as to his said work and the dangers if any that might pertain thereto; and defendant avers further that there were no dangers in said work if the same was properly done in the manner in which plaintiff was instructed and directed to do same, and that there was not and would not have been any piling or jamming or entangling or lumber in said work if the same was

properly done in the manner in which plaintiff was directed and instructed to do the same.

VII.

Defendant has no knowledge, information or belief sufficient [64] to enable it to answer, as to whether plaintiff received any or either of the injuries mentioned in said complaint or suffered bodily pain, mental anguish or the loss of his right foot, or any disability whatever, or as to the permanency or possible duration thereof, or as to whether his capacity to earn a livelihood has become impaired or diminished or will so continue; and on said ground denies that plaintiff sustained any injuries, whatsoever, or suffered any bodily pain or mental anguish, or loss of any foot, or any disability whatsoever, or that any disability of plaintiff will be permanent or will diminish or impair or has diminished or impaired any capacity of plaintiff whatsoever; and specially defendant denies that plaintiff has been damaged, in the sum of twenty-five thousand dollars, or in any other sum or amount whatsoever.

VIII.

Defendant has no knowledge, information or belief sufficient to enable it to answer, as to any of the allegations contained in paragraph 8 of said second amended complaint, and basing its answer on said ground, denies each and every of the allegations in said paragraph contained, generally and specifically; and specially denies that plaintiff was compelled to incur or did incur liability in the sum of \$485, or any other sum or amount whatsoever, whether for board,

lodging, or treatment at any hospital or sanitarium, or surgical or medical aid or attention thereat, or elsewhere, or otherwise, or at all, and specially defendant denies that the reasonable or any value of such board, lodging, treatment, or surgical or medical aid or attention, or all or any thereof, was said sum of \$485, or any other sum or amount whatsoever; and specially defendant denies that plaintiff has been damaged in the sum of \$485, or in any other sum or amount whatsoever. [65]

IX.

For further, separate and distinct answer, said defendant alleges that the said plaintiff himself did not exercise ordinary care or caution to avoid being injured, and that the injuries, if any, sustained by the said plaintiff, as alleged in said complaint, or otherwise, were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said plaintiff and the failure of said plaintiff to exercise ordinary care for his own protection as aforesaid.

X.

For further, separate and distinct answer, said defendant alleges that the injuries sustained by the said plaintiff, if any, were a risk incident to the business in which he was employed, and that prior to receiving such injuries the said plaintiff knew, or by the exercise of ordinary care upon his part, should have known, of the danger incident to working in the position in which he was; and that the said plaintiff then and there assumed the risk of being injured as he was, if he was so injured, in and

about the said work, and that the injuries of the said plaintiff were a risk assumed by him the said plaintiff as incident to his said employment.

XI.

For further, separate and distinct answer, said defendant alleges that the injuries sustained by the said plaintiff, if any, were a risk incident to the business in which he was employed, and that prior to receiving such injuries the said plaintiff knew, or by the exercise of ordinary care upon his part, should have known, of the danger incident to working in the position in which he was; and that said plaintiff fully understood, comprehended and appreciated, prior to receiving such injuries, the dangers incident to [66] the use of the machinery, ways, appliances and structures mentioned in said complaint, and thereafter consented to use the same and continued in the use thereof.

XII.

For further separate and distinct answer, said defendant alleges that if the injuries, if any, of the said plaintiff were caused wholly or in part by the negligence of any other person or persons than the said plaintiff, such other person or persons were at the time coemployees of said plaintiff, engaged in the same general business, and in the same department of business in which he said plaintiff was engaged at the time of said accident, and were not superiors in rank to the said plaintiff nor had they the power of employing or discharging men, and defendant alleges that it exercised and used ordinary care in the selection and retention of all employees

engaged in the same general business in which said plaintiff was engaged at the time of said accident.

Wherefore, defendant prays judgment, for its costs.

GIBSON, TRASK, DUNN & CRUTCHER,

Attorneys for Defendant.

[Endorsed]: At law. No. 1478. U. S. Cir. Ct., 9th Circuit, Southern Div., Southern Dist. of California. H. C. McCann, etc., vs. Benson Lumber Co. Answer to the Second Amended Complaint. Received copy of the within answer this 10th day of July, 1909. Haines & Haines, Hunsaker, Britt & Fleming, Attys. for Plaintiff. Filed Jul. 10, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Gibson, Trask, Dunn & Crutcher, 718 Pacific Electric Building, Los Angeles, Cal. [67]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Amended Answer to Second Amended Complaint.

Now comes the said defendant in the above-entitled action, pursuant to stipulation filed herein, and

without waiving its demurrer filed with its answer in this cause, and in lieu of the said unverified answer hereinbefore filed, for amended answer to the second amended complaint on file herein:

I.

Defendant has no knowledge, information or belief, sufficient to enable it to answer, as to whether or not plaintiff is a minor, of the age of nineteen years, or otherwise, and on said ground denies that plaintiff is such minor, of said age, or is a minor at all.

II.

Defendant denies that the drop from the said "push-table" to the said "carrying-table" was two feet or thereabouts, but alleges that same was not over four feet downward and outward so that the nearest edge of the said "carrying-table" to the nearest edge of the said "push-table" was not over four feet downward and outward.

III.

Defendant has no knowledge, information or belief sufficient [68] to enable it to answer, as to whether or not plaintiff was, on the 30th day of July, 1907, of the age of seventeen years and three months, or thereabouts, and on said ground denies that plaintiff was of said age of seventeen years and three months or thereabouts, or was a minor, or was of any age under twenty-five years or thereabouts.

IV.

Defendant denies that whenever lumber might clog, jam or pile up on said chute, outside platform, or "push-table," or elsewhere, or at any time, plain-

tiff, either in the course of his said employment or otherwise, was required by defendant to go upon said outside "push-table" or upon any table whatsoever, either while said rollers were in operation, or revolving, or otherwise, or at all, or while lumber was being delivered in continuous streams or otherwise, from the inside of said mill or elsewhere, or at any time, or at all, either to loosen or disentangle any lumber which may have become clogged or piled up, or to start the same, or to keep the same moving or for any purpose or object whatsoever, or at all; and defendant denies that it had provided no other means for releasing, loosening or disentangling clogged or piled up lumber than for its employees or any thereof to get on or upon said "push-table" or there to accomplish such releasing, loosening or disentangling of such lumber, or otherwise; and defendant further answering admits that it had provided no means for mounting on said "push-table," and alleges that such push-table was not to be mounted by any of the defendants' servants, agents or employees, at any time, while said mill was in operation, and further alleges that if any person, servant, agent or employee of defendant should essay to mount the said push-table, although defendant did not expect, require or permit the same to be done, there were other and better and safer methods for mounting [69] thereon than to step up or over or upon the same from the said carrying-table, over the said dog roller.

V.

Defendant denies that on said 30th day of July,

1907, or at any other time, said outside platform or push-table was a dangerous or unsafe place, or a place whatsoever, on, in or with which to work, and on the contrary avers that the said push-table was not a place on which any employee or person whomsoever was required, expected or permitted to work; denies that it maintained said outside platform or push-table in a defective or unsafe condition, or that it did not exercise ordinary care in reference thereto, and denies that the said push-table was a place for plaintiff or any other employee of defendant or any person whatsoever to work, but alleges that the same was as safe as it was possible for a machine of its nature and kind to be; and denies that defendant failed to provide any safeguards which were fit or proper therefor; denies that it maintained said chute or slide in a defective or unsafe condition, or that it did not exercise ordinary care in reference thereto, and denies that the said chute or slide rendered unsafe any place defendant had provided for plaintiff to work in, but alleges that the said slide was as safe as it was possible for an appliance of its nature and kind to be; denies that it did not have or provide, at said time or at any time, a sufficient number of skids or other device, for said chute or slide, properly to carry the lumber from said mill to said push-table, and denies that by reason of any lack of skids, or defect, or lack of proper devices, said accumulations, jams or clogs of lumber were liable to occur or said loading platform or carrying-table were rendered unsafe places at, on or about which to work; denies that said outside plat-

form or push-table was then or there [70] or at any time or place defective or unsafe in that defendant had no reasonably safe place or means of approach thereto or for mounting or going thereon or to protect plaintiff or any person from the said dog-roller, or otherwise, or at all, and in respect to said allegations of said second amended complaint defendant alleges that said push-table was not a place to be mounted, or for the doing of any work thereon, and that said dog-roller was not an appliance over or about which plaintiff or any other person whomsoever was expected, required or permitted to do any work whatsoever; and further defendant denies that there was no reasonably safe place or means of approaching or mounting the said push table, although defendant alleges that there was no occasion or duty resting on plaintiff or any employee of defendant or any person whomsoever to get on or work on said push-table, at the time mentioned in said complaint, or at any time; denies that the loosening or releasing of lumber which might become clogged, piled up or jammed in any of the appliances mentioned in said complaint, was required to be done when said mill was in full operation, but alleges that only such loosening and disentangling of such lumber as could be safely done, by the use of appliances furnished by defendant therefor, and without mounting upon either said push-table or said slides, was required or expected to be done without stopping the operation of said mill, and that any loosening or disentangling of such lumber which could not be so done, with such appliances so fur-

nished by defendant, safely, and without mounting said push-table or slides, was by defendant expected, permitted and required only to be done by and after stopping the machinery of the said mill connected therewith; denies that great noise or confusion, or any confusion whatsoever, were attendant upon the full or any operation of said mill, or that the work or labor [71] of loosening or releasing the said clogged, jammed or piled up lumber required haste, either extreme, or desperate, or otherwise, or at all, or the exercise of great or violent muscular exertion, or was, under such circumstances, or otherwise, of a distracting character, either extremely, or at all; denies that said work was, in any respect, unsuitable in character, or under the circumstances under which it was performed, or otherwise, for anyone, whether minor or adult, or for the plaintiff; denies that at said time, or at any time, defendant failed to use ordinary or any care to provide a safe way or safe appliances for the use of plaintiff in mounting or going upon said outside platform or push-table, or that it failed to use ordinary care in any respect or in connection with any of the matters or things mentioned in said complaint, and denies that plaintiff was expected, permitted, or required by defendant or any of its servants, agents or employees, to mount or go upon said push-table; denies that defendant had provided no safe way or safe appliances that could have been used in mounting said push-table, but inasmuch as said push-table was not a place where work was to be done, or which it was expected would be mounted, defendant denies that any duty rested

on it to provide any means, way or appliances for the use of plaintiff or any person, to mount or go upon the same; denies that plaintiff had no experience of or did not know of the perils or dangers, if any there were, in doing the work for which he was employed or in which he was engaged; denies that defendant failed to warn said plaintiff of the dangers and perils to him incident to his said employment and work; denies that said plaintiff was either youthful or inexperienced, or that, with knowledge of any youth or inexperience of plaintiff or [72] of any circumstances whatsoever or otherwise, defendant required plaintiff to expose himself to any perils or dangers whatsoever, either carelessly, negligently, or recklessly, or otherwise, or at all; denies that at said time or at any time whatsoever, the said outside platform or "push-table" was a place for plaintiff to work in, or in which he was expected, permitted or required by defendant to work, whether unsafe as stated in said complaint or otherwise or at all, and denies that defendant knew or had means of knowing of the said push-table as a place, unsafe or otherwise, for plaintiff to work in; denies that said chute or slide, or anything whatsoever, rendered said outside platform an unsafe place in which to work, and denies that the said outside platform was a place at all in which work was permitted, required or expected by defendant to be done; denies that the discharge or stream of lumber from said mill rendered any work therein perilous or unsafe, and denies that plaintiff, either by reason of youth or inexperience or the character of his work, or otherwise, or at all,

was exposed or liable to injury, peculiarly especially, or otherwise, or at all, in the performing of his said work.

VI.

Defendant denies that on the said day mentioned in said complaint, or at any time, a large amount of lumber became clogged, jammed or piled up between said skids or elsewhere, as therein alleged; admits, however, that one or two pieces of lumber did become clogged between said skids; denies that plaintiff mounted or went upon said outside platform or push-table at said time or at any time in the course of his said employment, either to disentangle any lumber, or for any purpose whatsoever; and denies that any lumber had then or there or elsewhere or at any time become tangled or jammed by reason of any dangerous character of any work in said mill; [73] denies that any of the work in said mill was of a dangerous character, or that plaintiff was not provided with a reasonably safe place in which to work, or that a proper or sufficient chute or slide was not provided, or that all proper ways and appliances were not provided, or that plaintiff, as a youth or otherwise, was exposed to any dangers by defendant or that defendant failed to warn plaintiff of the dangers connected with said employment, if any, or that defendant failed to instruct plaintiff in what manner he could safely perform his said duties, or that defendant was negligent in either or any of the matters or things in said second amended complaint contained or specified, or otherwise; denies that by reason of any act or acts, fault, carelessness, omis-

sion or negligence of defendant or any of its servants, agents, or employees, except said plaintiff, said plaintiff sustained any injury whatsoever; denies that any injuries which plaintiff may have received were caused by said rollers on said push-table not being stopped at any time or by reason of defendant's continuing the operation of said mill; and specially denies that plaintiff sustained injuries or damage in the sum of \$25,000 or in any other sum or amount whatsoever; and defendant avers that plaintiff was fully informed and instructed as to his said work and the dangers if any that might pertain thereto; and defendant avers further that there were no dangers in said work if the same was properly done in the manner in which plaintiff was instructed and directed to do same, and that there was not and would not have been any piling or jamming or entangling of lumber in said work if the same was properly done in the manner in which plaintiff was directed and instructed to do the same. And defendant further alleges that it had instructed said plaintiff not to go on or upon the said push-table and had not only [74] warned and instructed him not to go on said push-table, but had ordered him not to go on said push-table; that there was no necessity of plaintiff's getting on said push-table; and defendant further alleges that there was at no time any jamming or piling of logs or lumber, nor could there be any jamming or piling of logs or lumber, greater than the fact that one or two boards might get caught going over said push-table, and plaintiff had the means of loosening the said boards and lumber,

or whatever might get caught, without going on said push-table; and defendant further alleges that in the event plaintiff went upon the said push-table that there were means and ways of going upon the same with safety to himself, and without passing over the said dog-roller in which his foot was caught; and defendant further alleges that plaintiff voluntarily and contrary to the orders and directions of defendant went upon the said push-table, and chose the most dangerous and hazardous means possible of going on the said push-table.

VII.

Defendant has no knowledge, information or belief sufficient to enable it to answer, as to whether plaintiff received any or either of the injuries mentioned in said complaint or suffered bodily pain, mental anguish or the loss of his right foot, or any disability whatever, or as to the permanency or possible duration thereof, or as to whether his capacity to earn a livelihood has become impaired or diminished or will so continue; and on said ground, denies that plaintiff sustained any injuries whatsoever, or suffered any bodily pain or mental anguish or loss of any foot, or any disability whatsoever, or that any disability of plaintiff will be permanent or will diminish or impair or has diminished or impaired any capacity of plaintiff whatsoever; and specially [75] defendant denies that plaintiff has been damaged, in the sum of twenty-five thousand dollars, or in any other sum or amount whatsoever.

VIII.

Defendant has no knowledge, information or be-

lief sufficient to enable it to answer, as to any of the allegations contained in paragraph 8 of said second amended complaint, and basing its answer on said ground, denies each and every of the allegations in said paragraph contained, generally and specifically; and specially denies that plaintiff was compelled to incur or did incur liability in the sum of \$485 or any other sum or amount whatsoever, whether for board, lodging or treatment at any hospital or sanitarium, or surgical or medical aid or attention thereat, or elsewhere, or otherwise, or at all, and specially defendant denies that the reasonable or any value of such board, lodging, treatment, or surgical or medical aid or attention, or all or any thereof, was said sum of \$485 or any other sum or amount whatsoever; and specially defendant denies that plaintiff has been damaged in the sum of \$485 or in any other sum or amount whatsoever.

IX.

For further, separate and distinct answer, said defendant alleges that the said plaintiff himself did not exercise ordinary care or caution to avoid being injured, and that the injuries, if any, sustained by the said plaintiff, as alleged in the said complaint, or otherwise, were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said plaintiff and the failure of said plaintiff to exercise ordinary care for his own protection as aforesaid. [76]

X.

For further, separate and distinct answer, said defendant alleges that the injuries sustained by the

said plaintiff, if any, were a risk incident to the business in which he was employed, and that prior to receiving such injuries the said plaintiff knew, or by the exercise of ordinary care upon his part, should have known, of the danger incident to working in the position in which he was; and that the said plaintiff then and there assumed the risk of being injured as he was, if he was so injured, in and about the said work, and that the injuries of the said plaintiff were a risk assumed by him the said plaintiff as incident to his said employment.

XI.

For further, separate and distinct answer, said defendant alleges that the injuries sustained by the said plaintiff, if any, were a risk incident to the business in which he was employed, and that prior to receiving such injuries the said plaintiff knew, or by the exercise of ordinary care upon his part, should have known, of the danger incident to working in the position in which he was; and that said plaintiff fully understood, comprehended and appreciated prior to receiving such injuries, the dangers incident to the use of the machinery, ways, appliances and structures mentioned in said complaint, and thereafter consented to use the same and continued in the use thereof.

XII.

For further, separate and distinct answer, said defendant alleges that if the injuries, if any, of the said plaintiff were caused wholly or in part by the negligence of any other person or persons than the said plaintiff, such other person or persons were at

the time coemployees of said plaintiff, engaged in the same general business, and in the same department of business in which he said plaintiff was engaged [77] at the time of said accident, and were not superiors in rank to the said plaintiff nor had they the power of employing or discharging men, and defendant alleges that it exercised and used ordinary care in the selection and retention of all employees engaged in the same general business in which said plaintiff was engaged at the time of said accident.

WHEREFORE, defendant prays judgment for its costs.

GIBSON, TRASK, DUNN & CRUTCHER,
Attorneys for Defendant.

State of California,
County of San Diego.

O. J. Evenson, being first duly sworn, deposes and says: That he is an officer and agent of the defendant in the above-entitled action, to wit, vice-president and manager, and as such is better informed concerning the facts of the above-entitled action and the facts pertaining to the defense of the above-entitled action, than any other agent or officer of the said defendant, and that for that reason affiant makes a verification of this amended answer.

Affiant further says that he has read the foregoing amended answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

O. J. EVENSON.

Subscribed and sworn to before me this July 24, 1909.

[Seal]

E. V. WINNEK,

Notary Public, Within and for the County of San Diego, State of California. [78]

[Endorsed]: No. 1478. U. S. Circuit Court, Ninth Circuit, Southern District of California. H. C. McCann, etc., Plaintiff, vs. Benson Lumber Co., Defendant. Amended Answer. Filed Jul. 28, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Received copy of the within answer this 28th day of July, 1909. Haines & Haines, Hunsaker, Britt & Fleming for Plaintiff. Gibson, Trask, Dunn & Crutcher, Los Angeles, Cal., Attys. for Deft. [79]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

**Amendment to Defendant's Amended Answer to
Second Amended Complaint.**

Comes now the defendant in the above-entitled cause and by leave of Court first had and obtained amends its amended answer as follows:

On page 2, paragraph 4, line 24, after the words "or otherwise," strike out all of the remainder of said paragraph 4, including lines 1 and 2 on page 3 of the amended answer, and insert in lieu thereof the following denials and allegations:

"Defendant denies that it had not provided any means for mounting upon said push-table, and alleges that there were other, better and safer means and methods for mounting said push-table than at the place and in the manner in which said plaintiff at the time the injuries alleged to have been received by him, attempted to mount said push-table from the carrying-table and over said dog-roller; and defendant further alleges that lumber buggies were kept constantly alongside said push-table and that it was the custom of the employees whenever it became necessary to mount said push-table to mount the same from said lumber buggies, which was a safe, easy and convenient means of mounting said push-table."

WRIGHT & WINNEK,

Attorneys for Defendant. [80]

State of California,

County of San Diego,—ss.

J. Campbell Black, being duly sworn, deposes and says: That he is the manager of Benson Lumber Company, defendant in the above-entitled action; that he has heard read the foregoing amendment to defendant's amended answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as

to those matters that he believes it to be true. That he makes this verification for and on behalf of said defendant corporation and is duly authorized to make such verification.

J. CAMPBELL BLACK.

Subscribed and sworn to before me, this 12 day of Sept., 1913.

[Seal]

E. V. WINNEK,

Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: C. C. No. 1478. At Law. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Company, a Corporation, Defendant. Amendment to Defendant's Amended Answer to Second Amended Complaint. Filed September 12, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Wright & Winnek, 817-820 Timken Building, S. E. Corner Sixth and E. Streets, Attorneys for Defendant. [81]

[Verdict.]

*In the District Court of the United States, for the
Southern District of California, Southern Divi-
sion.*

C. C. No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guard-
ian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

We, the jury in the above-entitled cause, find in
favor of the plaintiff, in the sum of \$8,000.

San Diego, Cal., Sept. 16th, 1913.

GILBERT C. ARNOLD,

Foreman.

[Endorsed]: C. C. 1478. U. S. District Court,
Southern Dist. of Calif., Southern Division. *J. H.*
McCann, etc., vs. Benson Lumber Co. Verdict.
Filed September 16, 1913. Wm. M. Van Dyke,
Clerk. By C. E. Scott, Deputy Clerk. [82]

[Judgment.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

C. C. No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

This cause having come on regularly for trial on the 12th day of September, 1913, being a day in the September Term, A. D. 1913, of the District Court of the United States for the Southern District of California, Southern Division, before the Court and a jury of twelve (12) men duly impanelled; A. Haines, Esq., appearing as counsel for plaintiff, and Leroy A. Wright, Esq., and A. V. Winnek, Esq., appearing as counsel for defendant, and the trial having been proceeded with on the 12th, 13th, 15th, and 16th days of September, 1913, and witnesses having been sworn and examined, and the evidence having been closed, and the cause, after argument by counsel for the respective parties and the instructions of the Court, having been on said 16th day of September, 1913, submitted to the jury, and the jury thereafter on said 16th day of September, 1913, having rendered the following verdict:

“In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

We, the jury in the above-entitled cause, find in favor of the plaintiff, in the sum of \$8,000.

San Diego, Cal., Sept. 16th, 1913.

GILBERT C. ARNOLD,

Foreman.” [83]

and the Court having ordered that judgment be entered herein, in accordance with said verdict in favor of the plaintiff and against the defendant in the sum of Eight Thousand Dollars (\$8,000.00);

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court that H. C. McCann, by Jesse F. McCann, his guardian *ad litem*, plaintiff herein, have and recover of and from the Benson Lumber Company, a corporation, defendant herein, the sum of Eight Thousand Dollars (\$8,000.00), together with the costs and disbursements of said plaintiff in this behalf taxed at \$88.25/100.

Judgment entered September 18, 1913.

WM. M. VAN DYKE,
Clerk.

By C. E. Scott,
Deputy Clerk.

[Endorsed]: C. C. No. 1478. United States District Court, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Company, a Corporation, Defendant. Copy of Judgment. Filed Sep. 18, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [84]

[Certificate of Clerk to Judgment and Judgment-roll.]

In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book No.

2 of said Court for the Southern Division, at page 219 thereof, and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Attest my hand and the seal of said District Court this 18th day of September, A. D. 1913.

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk.

[Endorsed]: C. C. No. 1478. In the District Court of the United States for the Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff' vs. Benson Lumber Co., Defendant. Judgment-roll. Filed September 18, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Recorded Judgment Register, Book No. 2, page 219. [85]

In the District Court of the United States for the Southern District of California, Southern Division.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Stipulation [as to Exhibit III—Model of Portion of Mill].

IT IS HEREBY STIPULATED that the model of a portion of the mill where plaintiff was hurt, which was used in evidence by both sides, for the purpose of illustration, may be considered as attached to the original Bill of Exceptions, as Exhibit No. III, without being physically attached thereto, and that if the defendant sues out and obtains a Writ of Error in the above-entitled action, that the Clerk of the said District Court of the United States for the Southern District of California, Southern Division, may attach the said model to the original printed transcript of the record and cause the said model to be filed with the said original transcript of record in the United States Circuit Court of Appeals for the Ninth Circuit.

HAINES & HAINES,
Attorneys for Plaintiff.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,
Attorneys for Defendant.

[Endorsed]: C. C. 1478. In the District Court of the United States, for the Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, [86] vs. Benson Lumber Company, a Corporation, Defendant. Stipulation. Filed Nov. 20, 1913. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Gibson, Dunn & Crutcher, Attorneys for Defendant. [87]

ORIGINAL.

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

C. C. #1478.

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

Received copy of the within Bill of Exceptions
this 19 day of November, 1913, the same being
served within the time allowed by law and as ex-
tended by stipulations of the parties hereto and by
the order of Court duly made.

HUNSAKER & BRITT,
HAINES & HAINES,

Attorneys for Plaintiff.

GIBSON, DUNN & CRUTCHER,

Attorneys for Defendant.

Filed Nov. 20, 1913. Wm. M. Van Dyke, Clerk.
By R. S. Zimmerman, Deputy Clerk.

Settled and filed January 5, 1914. Wm. M. Van
Dyke, Clerk. By C. E. Scott, Deputy Clerk. [88]

ORIGINAL.

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled action came on regularly for trial on the 12th day of September, 1913, in the above-entitled court before the Honorable Olin Wellborn, Judge; plaintiff appeared by Haines & Haines, his attorneys, and the defendant by Leroy A. Wright, one of its attorneys, and a jury of twelve persons were duly impaneled and sworn to try said cause, and thereupon the following proceedings, and none other, were had: [89]

Testimony of Mrs. Ida L. McCann [for Plaintiff].

Mrs. IDA L. McCANN, called, sworn and examined as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. HAINES.)

My name is Mrs. Ida L. McCann. I am the mother of the plaintiff, H. C. McCann. He was born April 15th, 1890. At the time of this accident he

(Testimony of Mrs. Ida L. McCann.)

was seventeen years and a little over, old—two months, I think it was, from April 15th to July 30th. I saw him after this accident occurred just as soon as I could get to the hospital, to the sanitarium.
[90]

Testimony of H. C. McCann [in His Own Behalf].

H. C. McCANN, called, sworn and examined in his own behalf, testified as follows:

Direct Examination.

(By Mr. HAINES.)

Mr. HAINES.—I will ask the plaintiff to be sworn, with this explanation, that I only wish to examine him with respect to the *locus in quo*. We have his deposition which I want to avail myself of the statutory right to read.

My name is H. C. McCann. I am the plaintiff in the action. Since the accident I have given attention to studying the locality, the place, the premises where it occurred. I made this sketch of the premises which you show me within a few days. It is my work, and whatever measurements there are thereon, I made them. This paper, which is marked Plaintiff's Exhibit 1, relates right to the time of the accident, as it was at that time. I have used the scale of a quarter of an inch to a foot in making the drawing. I have studied this sort of drawing in correspondence, and it represents correctly what it purports to represent as to the measurements at the time of the accident.

Q. What does this upper half of this plat represent?

(Testimony of H. C. McCann.)

Mr. WRIGHT.—Just one more objection. I do not understand that this drawing purports to have been made at the time of the accident or shortly thereafter. It has been made within a few days. I would like to have witness qualify himself so that he shows he knows that it represents the plant as it was then.

Mr. HAINES.—That is what I asked him, you may cross-examine.

(By Mr. WRIGHT.)

Q. How do you know that this drawing represents the mill as it was at the time of the accident?

A. After the accident, right directly after that I studied this machine so that in making a few measurements [91] I know right where it stood.

Q. There have been some changes, have there not, in the push-table and carrying-table, and also in the trimmer?

A. No, sir, not *in* all. I do not know what the measurements were at the time of the accident. I made measurements of the push-table before the changes were made.

Q. Do you know what changes have been made?

A. Yes, sir.

Q. What changes have been made?

A. The changes that have been made were in the push-table.

Q. And what have been those changes?

A. It has been lowered a foot and moved out from the mill three feet. This drawing which I made represents the mill as it was before any change was

(Testimony of H. C. McCann.)

made. I made accurate measurements of all the details that are represented in this drawing. As near as I can remember, it has been a short time after the accident I took this course in drawing and have been studying. I have been studying ever since, about five years or thereabouts.

By Mr. WRIGHT.—I will withdraw any objection.

By Mr. HAINES.—In making those changes they have changed the whole situation right directly around the push-table. A board that was on the end of the table by the dog-roller was removed.

(It was here stipulated between counsel that a model of the push-table, carrying-table and platform as at the time of the accident should be used during the trial as an approximately correct representation thereof, subject to any change that might appear by the evidence or as corrected by oral testimony, and that each part of the model be lettered, the same lettering to be used as that used in the picture and photograph attached to plaintiff's deposition.)

(Witness continuing:) This board right on the end here by the roller, this board right here, that little piece in between there which I mark "X" was removed. The push-table [92] was lowered. This is the push-table marked "A." The carrier's table is marked "B," to correspond with the photograph. This is the loading platform, the platform we worked from. I mark it "F." The push-table was lowered one foot and moved out from the mill three feet. The lengthwise direction of the push-

(Testimony of H. C. McCann.)

table was 17 feet, 11 inches. It ran north and south, that is the measurement. This is shown on the diagram I have made here as Exhibit 1. The trimmer "D," as marked on the diagram was on the west side of the push-table. The carrier-table marked "B" is shown on my plat, and the loading platform "F" also. The place where the trimmer was is represented on this plat by "E." The trimmer consisted of a table about around the neighborhood of 30 feet long. The north end of the trimmer was directly west of the north end of the push-table. The south end of the trimmer was directly west about 8 feet from the south end of the carrier-table "B." The length of the trimmer was about 8 feet from the south end of the carrier-table to the end of the push-table. The trimmer is around the neighborhood of 12 feet wide. It had an incline sloping downward as it went in the mill, that is, it sloped westward. The upper edge of the trimmer, with respect to the east wall of the mill, ended directly at the east wall of the mill, and inclined then from the wall of the mill into the mill and downward, so that the wall of the mill made a sort of ridge as it were, of a roof, a ridge pole. This model represents the position of the mill as it is now in regard to the points of the compass. I will tell you what I know of the way the mill operated from the time the log was dragged from the bay onto the big log-carrier until the lumber was delivered over [93] this trimmer. The log was put on the main carriage that is up on the mill, to saw all the lumber. It carried it back and forth past

(Testimony of H. C. McCann.)

a band saw. As it sawed off each slab or boards, which ever happened to come first, it was dragged down on to a carrier. That mechanism is not represented here at all, it is away up in the fore part of the mill. I am demonstrating from the south end, which was at the bay where the logs come up from the bay. The mill was on the west side of all that is represented here. These posts here are the mill posts of the east wall, and the mill itself is on the west side of what would be this model. That was the mill for sawing these logs into lumber. Each time this carriage would come past the band saw, it would saw off a board. The carriage would move rapidly or slowly, it was under the control of the sawyer. Then the boards would drop on to a push-table which would push them long ways. That is not this push-table, it is another one in the mill. It would push them endways until they came to the edge of the table where they were shoved off sideways to the edger, then they would drop down on to a carrier-table and carried east to the trimmer. And the trimmer was located right directly there, as though you inclined a place from the east side of the mill at an angle of some degrees downward and inward of the mill which was in the neighborhood of 30 feet long and 12 feet wide. That had saws in, directly every two feet, so they could put a board on there the full length of the trimmer and cut it up into two foot lengths in one cut, and various places they would saw in between, which would make it a foot, so this was all controlled by the trimmer. They had a number of

(Testimony of H. C. McCann.)

saws so it could be cut [94] into two foot lengths, but each saw was controlled by the trimmer. The business of the trimmer is to operate all these saws, he controls all the saws; by raising them up into the table, they would be in position to saw, and by lowering them, they would be below the surface of the table and would not saw. The saws were worked by the trimmer pressing down on his foot with treadles. There was one saw about every two feet, and if I remember right, in various places, one to every foot. The saws were operated according to the size the boards would have to be trimmed up to. The size of the boards were generally from six feet long to the full length of the table, governed by the condition the board was in. He used the lumber that came to him to the best advantage to make the most lumber out of. When the lumber got to the west side of the trimmer table it continued to move upward and eastward until it got to the upper edge of the trimmer, the east end of the trimmer and the east wall of the mill. Then it dropped on the skids. I will mark the skids "E" on the model. The upper edge of the trimmer was right in there on the photograph. After the lumber reached the trimmer, the man that works the trimmer stood on what would be the southwestern corner of the trimmer and his elevation as compared with the upper end of the trimmer at the east wall of the mill was quite a bit lower. The trimmer sloped back, and he was lower than the lower end of the trimmer. He was up at the southwest corner of the trimmer right about in here, that

(Testimony of H. C. McCann.)

is west of the carrying-table and inside of the mill. From where he stood he could not see the lumber move after it had been delivered over out to the skids. The skids were out as far as the [95] trimmer went, leading on to this carrying-table. The skids extended the whole length of the trimmer, but that is not shown in this model. As a matter of fact, this device extended out as far as the trimmer. After the lumber was put on to the table once, there was a continuous passage from that on until it was dumped on these skids, the lumber did not stop after that, it was carried according to the cut he had made on the board, where it would light. If it was an extra long board it would drop on this table, the push-table, Table A, and by the process of these rollers on the table. These rollers were about six inch rollers, 4 feet long, revolving towards the south. The four to the north were smooth. The last roller on the south of the push-table was what is termed as a dog-roller. It was of the same size as the other rollers, only for the projections quite thickly of steel projecting at various lengths, and pieces of steel like bars would be in there. This part that was removed was about from the dog-roller around in the neighborhood of an inch and a half, maybe a little over, or maybe a little less. With respect to the diameter of the roller it extended about an inch over the top of the roller. These rollers are on the model, this is the dog-roller. The longest lumber came on to the push-table, being that this only took in half of the trimmer, being that

(Testimony of H. C. McCann.)

the carrier-table would only take in half. The part of the trimmer corresponding to the carrying-table extended only about one-half its length, so the short lumber, when it came on the trimmer, fell on the carrying-table, generally speaking, and the longest lumber, if you cut off a short length at the far end of it, the long length would drop maybe on that carrier-table, and the short lengths light on here, and be shoved back on to this table. In the further operation of the mill, supposing it to be in full operation, [96] these bands on the carrying-table represent endless chains. There are four or five of them and they moved eastward at right angles eastward from the movement of the lumber from the push-table. The lumber from the push-table came on to the carrying-table at the same time the lumber was coming from the trimmer on to the carrying-table. The two streams of lumber came together there on the carrying-table. There have been changes made since in this carrying-table, it was extended out further, with skids down here, and then a table a carrying-table extended on out about 138 feet. That was the change made of which I spoke. After the change was made, the lumber was loaded both sides of this long carrying-table. It is carried away from this carrying-table B, it goes over the skids to the eastward and then out on the platform 138 feet or thereabouts long. At the time mentioned in the complaint, to take care of the lumber and get it away as it was delivered in a stream, they had temporarily put in a 2 by 4, nailed so it would

(Testimony of H. C. McCann.)

come just on the top of those carriers on the carrying-table, stopping the lumber at the east side of the carrying-table, and they would lay there until we would pull it off, pulling it to the northward, and then load it on loading trucks which stood on the loading-platform. That is the general operation of the mill. There were four men in the gang that took care of this lumber. They worked in pairs. One of the two in the pair would take hold of this end of the board, whatever it happened to be there, whatever length or size, and pull it off, and the other would stand here, until the other end would come up and just going to drop off, and he would grab it and walk out and load it on to either one of the [97] trucks there. These trucks were push-trucks used for that purpose, two wheel trucks, the wheels about 3 feet wide, I think. There would be only two used at one time. One was placed on the east side of the loading platform, and the other was right up against the push-table, or on the west side of the working platform. There was just walking space between the two. There was not necessarily two men to each truck; it was the various sizes of lumber. We could grade off the lumber according to what truck it belonged to. In the model, the wire on the east end of the side, lengthwise of the east side of the push-table A, represents a shaft, a two-inch shaft running the length of the table, to revolve the rollers. All these rollers, including the dog-roller, were connected with the same shaft. The power was applied to them at the south end of the table, that is, of the

(Testimony of H. C. McCann.)

shaft down in there.

Mr. HAINES.—Before getting through with this *locus in quo*, I would like to call Doctor Hearne, who was called for this injury, and by consent of the counsel, we can get through with him in a little while.

Mr. WRIGHT.—We have no objections. Let the doctor take the stand. [98]

Testimony of Dr. J. C. Hearne [for Plaintiff].

Dr. J. C. HEARNE, on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. HAINES.)

My name is J. C. Hearne. I am a physician and surgeon. I was called to attend this plaintiff, H. C. McCann, about July 9th, 1907, for an injury. The amount of the bill was given to you. I have a little memorandum of it here with me. July 30, 1907. The amount of the hospital bill was \$248 and the surgical bill was \$200, making \$448. Part of this amount has been paid, \$339.28. It was not paid by him. It was paid by, I think his name is Winder, of the Benson Lumber Company. I had a call from the Benson Lumber Company to see a man who had been hurt at their place, and I went out there and Mr. McCann was brought to my hospital in an ambulance, and upon examination I found that the front part of his foot from the instep, or from the ankle above the instep was badly crushed and lacerated and torn, and I found it necessary to amputate his leg at this position. We call this a Chopart ampu-

(Testimony of Dr. J. C. Hearne.)

tation, it is the name of the man who first performed the amputation. It leaves the heel bone but all the balance of the bones in connection with the ankle are taken off to the end of the big bone, the small bone was taken off, but the heel bone is left intact as we found it there. We tried to save all the leg we could, but that is all we could save. There is probably some soreness where the instrument rubs it, probably it has some soreness. [99]

Cross-examination.

(By Mr. WRIGHT.)

I don't know as I can say that the plaintiff was about the same size when he was brought to my hospital as he is now. I should say that a man of his age, a young man, I would say that he has grown since, but I do not know. I would not swear. I did not make a particular observation as to whether he was an apparently fully developed boy or not. I don't know that I could say. I would say that ordinarily the boy is more developed now, and more of a man than he was at that time. It is only from my general knowledge of the condition of a man seven years later. He was under age at the time this thing happened, because I obtained a permit from his father and mother before I amputated his foot. That permission I have, so I know that at the time he was under 21 years of age. I don't know how much under 21 he was, but he was not 21 years old. I don't know the exact age. [100]

**Testimony of H. C. McCann [in His Own Behalf
(Recalled)].**

H. C. McCANN, plaintiff, recalled, testified as follows:

(By Mr. HAINES.)

As near as I can estimate, the number of revolutions of that shaft is around the neighborhood of 100 revolutions a minute. I never gave any thought to the shaft itself, the shaft being rolled through gears. I don't know whether it is geared up or lower, but it runs, in order to run the rollers at about 100 revolutions a minute. If I remember rightly the shaft runs the same as the rollers, being they were connected up with cogs in such a way that it would have to turn at the same rate as the rollers, making it about 100 revolutions. The shaft was in operation during all the time that the work was going on, sawing and delivering of lumber. This gang of four employees had to keep everything clear, up to the trimming-table, to the time they got the lumber. They had to keep clear all along those skids, and on the push-tables, and on the trimming-table.

Q. On the trimming-table, you mean?

A. On the carrying-tables.

Those four men were the only employees who were charged with the duty of having the lumber that came from the mill, loading them on trucks and keeping the skids and push-table and the carrying-table in operation and unclogged. The mill is not worked that way now.

(Testimony of H. C. McCann.)

There was a device on the east side of the push-table, to keep lumber coming down the skids from going over eastward off the table. It was in the form of a 4-inch plank that in the construction was left 2 inches above the table, or about one inch above the rollers. It was a four-inch plank set up [101] edgewise. It made a sort of a guard-rail on the east side of the push-table. The effect of it was to keep the lumber under normal conditions from going over the east side of the table, and over this shaft.

(Witness marks model G G, where two skids are marked or shown.)

(Witness continuing:) Those two skids G G were 6 feet from the farthest skid, that is at the north end of the whole construction. Each saw on the trimming-table had beside it a chain on either side which held the board up there on both sides even with it, being that each pair of those chains was spaced two feet apart, and it shows here in this photograph that there are three pairs of those come in between the skid at the farther end and the next pair of skids. This photograph is one that was presented to me by the defendant's attorneys when my deposition was taken, as being taken directly after the accident. From this diagram I would give the dimension of the push table as 17 feet 11 inches. The height from the loading table F up to the top of the push-table was five feet 7 inches. I recollect having attempted to look over the push table about the time I was working there. To get a look from

(Testimony of H. C. McCann.)

the loading-table over the surface of the push-table I would have to raise upon my toes, and then I could just scan along with my eyes, so I could see anything coming in between, I could see it. My height was about 5 feet seven about that time, and I had to raise myself up on my toes to look over this push-table. The loading platform was ten feet wide. After changing the mill it was 7 feet, being it was taken 3 feet off there. It was no longer used as a loading-table. [102] The platform is just there, and there is one man works around there. He attends to keeping the two tables clear, the push-table and the skids and the trimming-table, the carrying-table. That was a part of the work that the men had to do before the changes were made, and now they have one man a-purpose for that. The lumber is loaded off elsewhere, on the extension of the carrying-table. They were at work at the extension during the last week I was there. This machinery had been in approximately two weeks before the date of this accident. I had been about there before that time. The only thing that I know of that is of any importance which was put in just prior to those two weeks is the push-table and the carrying-table. Before that time I knew something about the operation of this mill. The trimmer delivered lumber over the wall of the mill down, before they had the push-table and this carrying-table. I helped to operate there. I had been working with it in that shape some time during the two weeks before that. I worked, I don't know exactly how

(Testimony of H. C. McCann.)

long. During that time when there was no push-table or carrying-table the lumber was delivered by skids running clear down to what we term now as the loading platform. The loading-table and those skids ran away down to the loading-table, and also a platform out this way, and is the whole length of the trimmer. We got the lumber to load it off the platform. Those skids came down at about 45 degrees, I couldn't say just exactly how long they were. They came all the way from the trimmer down to this carrying-table, and there wasn't any of this machinery at all. I had been working about two weeks, and the machine stood idle for about a week, and during that time this machinery was put in, this new machinery. I don't [103] know for what purpose the two joists or beams between the push-table and the carrying-table are there, but it was covered with boards, making a little platform in between there. There was a platform there. The height from the loading-table up to that little platform as shown on my plat was 2 feet 4 inches. This does not show the planks across, but there were boards. That was an actual platform, and the height was 2 feet 4 inches from the loading-table. From that little platform or step up to the carrying-table was one foot three inches. The top of the push-table above the carrier-table was two feet. The lumber kept coming down against the guard-rail and bending it and shoving it out and chewing it up. It showed gouges in places. Jams and the

(Testimony of H. C. McCann.)

force of the lumber coming down would occasion that.

In reference to how such a jam arose as occurred when the accident occurred, I have made a diagram here from the board coming down.

Mr. WRIGHT:—May I ask one question to determine whether I want to object?

(By Mr. WRIGHT.)

WITNESS.—I couldn't say that the illustration made here is an illustration of the board that was caught on the push-table at the time of the accident, but it was the position the board was in. It is not so much an imaginary board, the board was in exactly that condition at that time. I couldn't say whether this represents it in its length. It represents it in position. It don't represent the distance that it extended on any of those skids. It is represented as being under the skids, that the board was caught under when I got up on the push-table on the 30th of July, 1907. The illustration represents it as over the roller on the push-table that the [104] board was over when I got on the push-table on the 30th of July, 1907.

By Mr. WRIGHT.—No objection.

(By Mr. HAINES.)

Q. The corner of the board next to the guard-rail on the east you have represented—I will ask you to put letters upon this plat showing where the corner of the board impinged against the east guard-rail of the push-table, and you may use the letter V for that. Where the board went under the skids,

(Testimony of H. C. McCann.)

I wish you would mark it by the letter W, just in between the skids you can mark it. The upper part of this sheet is a representation of the premises there, looking that way?

A. Looking downwards; it is a vertical cross-section. That is, you look down from above. The diagram below there represents a cross-section looking from the east side. This is a vertical cross-section, and the other is a horizontal or plane cross-section.

The diagram referred to was thereupon offered in evidence and marked Plaintiff's Exhibit No. 1, a copy of which said diagram is hereto attached marked Exhibit I, and made a part of this Bill of Exceptions.

It appearing that on November 29, 1909, the defendant had taken the deposition of plaintiff herein and same had been read over, corrected and signed by said witness, as required by law, the plaintiff offered said deposition in evidence as part of the testimony of plaintiff, which said deposition was received in evidence as part of plaintiff's evidence and was as follows:

[Deposition of H. C. McCann, for Plaintiff.]

Direct Examination.

(By Mr. STERRY.)

I am the plaintiff in this action and understand [105] that you are taking my testimony, my deposition; know that you are taking my evidence in my case and that it may be used either for or against me.

(Deposition of H. C. McCann.)

I was nineteen last April, and my age at the time of this accident was seventeen or eighteen—I just passed one of the two; just passed seventeen. I had been working for the Benson Lumber Company approximately a month before this happened. I was employed as a laborer. I was in their employ at the time I got hurt. I was handling the lumber after it came from the mill. I had been doing the same kind of work for about two weeks.

Q. Now, I will show you a photograph. (Handing witness a photograph, later attached to the deposition as Defendant's Ex. I, a copy of which photograph is made a part of this Bill of Exceptions as Exhibit II.) Is that about a correct picture of the carrying-table and push-table?

A. Yes, sir. What you have marked "A" is the push-table, and that which you have marked B is the carrying-table, and this little thing that looks blurred in the picture which is marked C is the roller I got my foot in. These things marked D showing the machinery, are all rollers; they are part of the machinery that brought the lumber over and dropped it on the skids, and they fell from there on to the push and carrying tables. This platform that is marked F, that is where I stood ordinarily. Now, A is the push-table; B the carrying-table, D the machinery that carries it on to the skids, and F the table where I ordinarily stood. I do not know exactly how far it is from the platform where I stood to the top of the push-table. It is approximately about five and one-half feet. As near as

(Deposition of H. C. McCann.)

I can remember it is about five and a half feet from [106] F, where I stood, to the top of A, the push-table; that is my best judgment. Looking at A, I said that was the push-table; I meant the whole thing, not just the little piece. The short lumber comes over this mechanical device marked D and strikes on B and is carried forward, and some of it strikes on the push-table. Through the push-table there are little bars of steel running that keep revolving and shoving the lumber towards the carrying-table, so that the lumber was carried from the push-table forward to the carrying-table. The lumber is carried forward on the push-table by little points of steel running through it, that carry it on. As you look at the picture the lumber is carried to the right and is carried forward on the carrying-table and on the push-table it is carried towards you. Ordinarily I stood on F. I did not have a picaroon; I did not have anything to move the lumber with.

Q. Never had any? A. Yes, sir.

Q. I am not talking about the morning of the accident; ordinarily didn't you have something to move the lumber with?

A. Yes, sir. I had a picaroon; that is an instrument with a wooden handle about three feet long and a steel pick on the end. I had one, then I got another with a longer handle. I didn't have this the day of the accident. Before the accident, I would stand on F, and if the lumber got caught I would at times reach over with this picaroon and

(Deposition of H. C. McCann.)

start it; and before the accident I would get up on the push-table quite frequently; it was a general occurrence, more than once [107] a day, sometimes quite frequently during the day, nearly every day two or three times and sometimes many times a day. I got up there for the purpose of dislodging the lumber. I had never been hurt before this accident, and that time I got my foot caught when I got up on the push-table and part of it was taken off. I did not receive any other serious injuries outside of my foot; it was just my foot that got caught.

I do not know how it happened that I did not have a picaroon; the accident happened in the afternoon and after I returned from lunch my picaroon was gone; I do not know who had taken it and I didn't have time to inquire of anybody; I didn't ask anybody for it; it was about an hour and a half after that when I got hurt. There were persons working near me, a man by the name of Smith, I believe, and a man by the name of Coffin, and a Greek, George Kaludis; these men were right around me. I could not say whether any of them saw me get hurt.

At the time of the accident I got up on this push-table to get out a board that was lodged up in there; I believe it was an inch piece about ten feet long and eight inches wide; it got lodged under the first pair of skids and across here on this push-table; it was just one board, and if that had stayed there, there would have been a jam; the boys would shoot

(Deposition of H. C. McCann.)

down the lumber so fast there would be a jam up there.

Q. Before this day of the accident, how did you get up on this push-table, when you started up before this time?

A. Well, I just stepped on to here, and then here, and [108] then over. Indicates on picture.

Q. You see if you say here and here, that wouldn't mean anything to anybody. You stepped from F on to B?

A. No, sir; there is a small part right in there (showing) that don't show.

Q. There is a small table in between this A and B that doesn't show? A. Yes, sir.

Q. You would step on to there? A. Yes, sir.

Q. And from there to B? A. Yes, sir.

Q. And from B to A, the push-table?

A. Yes, sir. That is more of a step than a table, which does not show on this picture. I stepped from Platform F on to this small table or step; then on to B, the carrying-table, and from there to A, the push-table. I would step right up over that revolving roller. I could step over it quickly without getting hurt. This C that I describe as that revolving roller, that is termed a dog-roller; the roller is about an inch above the push-table. You cannot step over it easily; it's a fairly long step. You cannot necessarily step over it easily after you get used to it. I had to step from B. I did that several times every day, and sometimes a great many times a day. At times when there was a

(Deposition of H. C. McCann.)

truck there with lumber piled just right could get up from F on to the push-table and not go over the dog-roller, but if the lumber was either [109] too high or too low it wouldn't be any good; if there happened to be a truck there, by standing on F I could climb on to the table. If you go up by the dog roller there is danger of getting hit by lumber. If there wasn't any lumber there, there wasn't any danger. If you are once on there, there isn't anything to hit you except the lumber coming over. When high enough on the table, by looking you can see the lumber coming, but you couldn't from F, when standing on F, until it reached D; that is a mechanical device that throws it over.

Q. What do you call that? (Indicating on picture.)

A. I would call that the trimmer. When standing on F you could not see it reach this part of the trimmer until it came over the trimmer, but when you get on A you can see if the lumber is coming or not, from B you can't see it, but you can see it from the top of the push-table.

If I had had my picaroon I would not have reached around and got this piece of lumber loose; I do not think I would have pried it. There was a truck there, but I do not remember, but think there was some lumber on it. I do not know whether there was enough on it; I would not undertake to say. I could see trucks of lumber standing all around. I thought the truck was too low, or too high, I don't remember which, to go up on. I

(Deposition of H. C. McCann.)

have gone up on trucks of lumber, but I generally went over the way I went that day. I was in the act of stepping over and the next thing I knew my foot was caught. There was a little board down by the side there, my foot was caught between the edge of the board and the roller. [110] I could not say what the board was there for. I had seen it there very often. Of course, when I stepped over I knew the roller was there. I do not know how it was that I happened to get my foot caught that time; it was done so quick—just like a flash. My intention was to get that board out because there was other lumber coming, and the next thing I knew my foot was caught, even before I had any pain at all. I intended to make the step the same as I had usually made and clear it, and suddenly I felt my foot was caught, and the next instant it was being crushed. Most of it was taken off with the machine; the remainder was taken off by the doctor. I cried out, and my fellow-employees came right away.

I did not know what had become of my picaroon. I couldn't say whether anybody had swiped it. I had never been told about getting on this push-table. No one had ever said anything to me about it; I had orders to get the lumber out and had orders to keep it clear. I had one order, that was to get up and get that board out. Mr. Keltie, the foreman, he came and gave me that order; that was before that accident. That was the only order I ever had about it. Mr. Keltie was our foreman. I never spoke to him or ask him if there was any way of

(Deposition of H. C. McCann.)

getting up except over this dog-roller. I never made any complaint to anybody about it. I had no idea that I was going to get hurt the day of the accident when I considered going up over that dog-roller. I had done it probably a hundred times and had no idea that there was any danger to me of an accident, until my foot got caught. [111]

When I say the board was caught in the first pair of skids, I mean the first pair counting from the farthest end from the carrying-table, this pair of skids marked GG. A larger part of the board was resting on the push-table. It was lying flat. When I saw it get in that position I was on the platform marked F, and when I saw it I went right over to B; I didn't wait at all.

I was getting two dollars and a half a day at that time. I have been working since I left there; am now working for an automobile company; have been making a dollar and a quarter and a dollar and a half a day; I have been working for this company about six months. I would not be able to go back to do that same kind of work, if I had it to do, as I wouldn't be able to be on my feet so long, doing any such heavy work. I can hardly tell if my foot is getting better; it seems to get better and then it bothers me. I do not use crutches. I have used them; that was when I first got up, but haven't used them *since have* been out and around working. I was a very strong, active fellow before I was hurt; I could lift lumber and do any kind of rough work. I did lift lumber. I do not believe that I am quite

(Deposition of H. C. McCann.)

as strong and active now; I would not be able to do the work I done before in the condition I am now. At that time I could handle long pieces of lumber by myself and when I handled these I loaded them on trucks and did the work that other men did. I could have unloaded them by myself too. [112] When unloaded we usually called a man to help us, would not go to them when needed physical assistance as they would always be there; we all helped each other as people working side by side usually do. This man Coffin and this Greek, we were all in one gang. I was not over them in any way, we were all under Mr. Kelty.

Mr. STERRY.—I ask here to attach this picture to the deposition and make it part of the original record and marked it “Defendant’s Exhibit I.”

The picture referred to was thereto attached and marked “Defendant’s Exhibit I.”

Cross-examination.

(By Mr. HAINES.)

This accident occurred on July 30th, 1907; my birthday is April 15th; I was born in 1890.

In the manufacture of lumber and running this mill, the log was put on to the carriage; it was drawn up from the water and put on the carriage and there taken and drawn back and forth, each time going forward it would saw off a board and the boards would drop on to the roller-table, then it was carried over down to the edger sideways through the edger and drop onto a carrying-table, then it was carried from there to the trimmer and down to the push-

(Deposition of H. C. McCann.)

table. From the carrying-table it went to the trimmer, then through the trimmer it dropped down on these skids and from there onto the push-table. Up to that time the process occurred outside of the mill and from there on the short lumber dropped down on to the carrying-table; on the push-table outside of the mill it was carried endways and then dropped [113] down to the carrying-table; this was a continuous process from the time the log was drawn from the water on to the carrier for the saw until it reached the carrying-table to be loaded. As to the character of the work as to being strenuous and requiring hurry and attention and as to noise and confusion, you could not hear a man talking right alongside of you unless he hollered; as to the hurrying part, the machine was continually running lumber, it was coming right along, so in order to keep up with the machinery you had to hurry. When a jam occurred there was an arrangement for stopping the mill in some parts of the inside, or from the engine direct, the engine that propelled all the machinery of the mill; in general, the power was all furnished from one engine in running all these different portions of the mill.

These jams that occurred required loosening up after they left the mill and were caused by different pieces of lumber coming down, either coming down not straight as they should, or short pieces falling down would be between the rollers or between the carriers and when the next piece would come it would fall on top of them and that would hold it off the

(Deposition of H. C. McCann.)

carriers or rollers. Quite frequently a piece would come down crooked and would drop into this pit, right below the skids, stand up endwise, that one thing sticking up there would catch the other lumber coming down and hold them up on the skids or turn them more endwise and then there would be a jam in there; that state of things would happen quite frequently during the day when the mill was running. I could not give any number of times that it would happen during the day but you had to keep continually watching [114] out for them, they were getting in the way frequently. The trimmer was just inside the mill and from the trimmer it was carried outside of the mill on to these skids. At times the stream of lumber coming over from the trimmer on to these skids was every portion of a second at other times it was slower. It was according to how the lumber come from the trimmer, he would cut it as fast as he could, and it would take little time to send it through, then it would start running stuff, and you just had to keep up. The lumber came over on to these skids as fast as it was sawed all the time from morning until noon, and from time work commenced after dinner until night, with the exception of changing the saw which would take a slight time about the middle of the morning or the middle of the afternoon, and at other times the process was one continuous run of lumber from the saws down to the carrying-table. There were three men working with me to take care of the lumber as it came from the mill, we were working in pairs handling the lumber. It really required

(Deposition of H. C. McCann.)

two men to work together, and there were two pairs of us handling all this lumber that came from the mill, and part of our work was to load it upon the trucks down here on the platform. It was the duty and work of any one of the men that was nearest to it to release any jams that might occur either on the skids or push-table. There were no other men employed other than we four, to do that, there were four that were working there together, and no one else was employed to do that work but we four men. I was the most active of the gang in which I was working. I was then about seventeen years, three months and a half old. [115] I was very well grown and strong for my age. The other men went up there at times, but I did the most of it.

Mr. Kelty was yard foreman. I have forgotten whether I went to Tim Kelty direct or to Mr. Evenson. I went to the office and got employed. From Mr. Evenson first; that was about five weeks before the accident, but there was an interruption in the work during that time, they were putting in new machinery, it took about a week. When I resumed work I believe I was employed by Mr. Kelty, he hired me to go on when work was resumed and I continued to work on then until I was hurt.

Q. You said something in your direct examination about Kelty ordering you to do something with respect to releasing a jam of lumber; state just what was said, and when it was, how it came about.

A. As to when it was—when I first started to work on the table, sometime around the first few days.

(Deposition of H. C. McCann.)

Q. On what table?

A. On the carrying-table and push-table, and my attention was in a different direction from what the tables were, and he come up right close to me, and he says, "Get up and get that out."

I looked around, and there were several pieces of lumber on both tables, and he come down to where I was standing alongside the carrying-table with my back partly towards the push-table, and asked me to get them out. I was alongside the carrying-table on the platform, that's where I stood to take hold of the lumber and put it on the trucks. I had my back towards the carrying-table and the push-table.

[116] There was a jam right here on both tables, and when such a jam occurred, if it wasn't loosened up the lumber would keep on falling up there, and eventually it would cause about three or four times more work, or else the entire mill had to be stopped in order to get it out. Mr. Kelty told me to get up and get that out. I went up on the carrying-table and got that out, and then got up on the push-table and got that clear as quick as I could. I stepped over this roller. I do not remember how that jam occurred on the push-table at that time. I had a picaroon to use at that time, the one that was furnished by the company was about three and a half or four feet long, the handle to it. I furnished myself with another one about five feet long, I believe. I got a longer one in order to reach the lumber from the platform to save me getting up. When a board got stuck between a pair of these skids, with one

(Deposition of H. C. McCann.)

end down underneath and the other sticking out, it could not be loosened with a picaroon by standing on the platform F, it was not possible to do it. If a board should become lodged in that way, with one end sticking under the skids and the other sticking out, you could not loosen it up and get it out with a picaroon by standing on platform B. When a board was stuck in that way between the skids pulling down on the board would do no good, you had to get up and lift it up so as to get it out.

On this occasion, when I got hurt, the board stuck between two skids, marked G, being the first pair farthest from the spectator looking at the picture. It wasn't sticking down, it was up, under and across this push-table. [117] The end of the board nearest the mill was in under this pair of skids; it was under the further one, although the end extended clear across and under the nearer one too; that is, it comes from here right across under there, and stuck out here, the end of the board, a little ways there. As accurately as I can tell how that board was stuck in between those two skids and where the end nearest the mill was, the one end was over here laying flat against the table and one end lodged against the right side of the table under there, and under across under that further skid and across.

Mr. STERRY.—You mean that the board instead of lying straight, it was lying diagonally across the table on a slant, so you could not stand on this table and pull it out?

No, sir, the rollers were binding it up underneath.

(Deposition of H. C. McCann.)

I mean the rollers on the push-table, the rollers were working against this board, or some other board and binding it in there tight. It could not possibly have been removed by a picaroon from table B or platform F. When a jam of that sort happened we uniformly did as I did that time, got up and got it out—on top of the table. Either I, or one of the three other men working with me did that.

Mr. Evenson was general manager of this mill, and he was about the mill seeing this work go on where we were working. Mr. Evenson saw us get up there many times. He was about the mill constantly. He never cautioned me about this dog-roller or explained to me anything about the danger of the work there. Mr. Kelty never gave me any such caution; he knew the men were doing this work in that way. At the time Mr. Kelty told me to get up and release the jam, sometime before this accident, I got up on the carrier-table—being at the first place, I cleared out what there was there, and I got [118] up on the push-table, the same way I did when I got hurt. Mr. Kelty saw me go up there.

Q. Did he tell you what the nature of this work was, as to keeping you on the jump?

A. Well, we had to keep it cleared out as fast as the lumber came, else the mill would get ahead of us.

It was constantly heavy work; had to keep on the move from morning till night unless the mill happened to stop, when they were changing the saws, or something like that, then we would get a little rest. It was the hardest work I ever did, and the

(Deposition of H. C. McCann.)

other men thought it was extra hard work for them to keep agoing; it was continually handling small and large lumber; smaller lumber would come faster than the large, so it was about all we could do to keep up with things, keep the lumber clear, and the tables in such a way that they would receive more lumber without being jammed up.

Before Mr. Kelty gave me orders to clear out lumber, I had been in the habit of going up there very little. When he gave me that order I got up there and used my hands. We had a picaroon there. I never just had it in my hands; I did not take the picaroon to loosen up, I did it with my hands. After this direction from Mr. Kelty, whenever a jam occurred that could not be readily released with the picaroon, either I or some of the other men got up there and cleared it out. Mr. Kelty was around there several times a day, knowing what work was going on, overseeing it.

The general nature of the injury which I suffered was—I lose the forepart of my foot, just the ankle and heel is left, I was in the hospital five weeks and four days, I believe. [119]

There was a truck alongside the push-table at the time this accident occurred; it was standing alongside the push-table; I was standing alongside the carrying-table.

Q. Which direction was the truck from you?

A. Well, it was (showing by the picture) away from me there.

It was down on the same platform I was standing

(Deposition of H. C. McCann.)

on; there was no team hitched to it, just a small two-wheeled truck; these were not trucks worked by horses, simply push-trucks. When lumber was loaded upon them we would put one end on a little horse we had there and aim to balance the truck as near as we could. The reason why I didn't try to get up on the truck, it was either too high or too low, I recollect it being one of the two; if I remember just exactly right, it was piled up exceptionally high with pieces that would have fallen off if I tried to get up on the side and climb up the side. The most convenient way was to get up on table B.

After I got out of the hospital I was disabled about six months before I was able to do anything to be considered. I next worked at running an elevator. After I got out of the hospital and commenced working in the elevator I was not able to be up on my feet much. I could sit down in the elevator a greater part of the time. I believe I was running the elevator about six or eight months after that. I am not able to do manual labor which requires me to be on my feet. I am now engaged in soliciting tourists for an automobile company.

No one in authority about that mill ever cautioned me about any danger in getting up and down to clear out those lumber jams. [120]

When one man of this gang of four was up on either of those tables, that left one pair broken up, and it was necessary for him to get back as quick as he could to help his partner load lumber. It was absolutely left to us four men to see that these jams

(Deposition of H. C. McCann.)

were cleared up when they had them, there was no other person or laborer provided to do that, no other means provided than the labor of one of us four men.

The last I knew of Mr. Coffin, he was in Ottawa, Minnesota. I could not say where this Greek is, the last I saw he was around town here, and I couldn't say where Smith is. [121]

Since this action was begun I got an artificial foot, or appliance to my foot; the expense for that was \$65 and my expenses of travelling up and staying in Los Angeles until I got the limb, having it tried on; the fare and lodging where I stopped would be about fifteen dollars in all. This injury has affected my health in a way; it has weakened me; I can't exercise as much as I did before; it has injured my system in that way to a general extent; I do not get as much exercise, and do not keep in as good health as I was before; my nervous system is very much put out, my nerves are not in condition like they were before in any way; at times much more unstrung.

Redirect Examination.

(By Mr. STERRY.)

I couldn't take the picaroon and force the plank around in a straight position and drag it out on to the platform because it was caught and was binding with the rollers. You can't shove it with a picaroon; you can only pull it out. The people could not have heard me had I called on them to help me. When Mr. Kelty ordered me to go up there it was the first few days I was working on this new machinery,

(Deposition of H. C. McCann.)

which had been put in during the time I was laid off, this here push-table and carrying-table.

Q. Before that you had been on the push-table very little?

A. Before that, it was just a few days after I had this lay off.

Q. But you, whenever there had been a jam, you had gone up there and gotten it off? [122]

A. After I started to work again after they had this new machinery in, I worked mostly from the ground; with a picaroon it would have taken longer to do it.

I had been up there before once or twice, and I believe I went the same way. The day of the accident the conditions were the same as when Mr. Kelty ordered me up there; the machinery and everything was the same way; there wasn't any change in any of the machinery after they put in this push-table and carrying-table; the dog-roller and all those were just the same. The accident happened in the afternoon, about two o'clock, I believe. I couldn't recall the time exactly.

Q. Of course you knew it would be easy to get your foot hurt if you got your foot caught in the roller? A. I never gave any thought to it.

Q. You would have if you had stopped and looked at it? A. Not necessarily.

Q. You knew it was revolving? A. Yes, sir.

Q. You didn't mean to get your foot in?

A. No, sir. But as to knowing it would be dangerous, I never gave any thought to that.

(Deposition of H. C. McCann.)

I would not have experimented or stuck my foot in it if I could have helped it. I intended to step over it and by it. I would not have gone if I had known I would get my foot caught.

If this jam would continue for fifteen or twenty minutes it would delay us more; it would have been impossible to clear it off without stopping the mill; they stopped the trimmer, and it had to be stopped coming down there; you can stop the trimmer without stopping the mill. As soon as they stop putting in lumber, we can work right along then. [123] I had seen that done before the accident.

Q. You didn't call out to anybody to help you; you started right ahead to fix it?

A. But he can't stop the lumber after he gets it onto the thing—

Q. (Interrupting.) Well, he could if you would call out to him.

I refer to the trimmer; if he had stopped the trimmer that would have stopped the lumber coming over. The lumber was coming in a continual stream; there would be times the lumber would come very fast, one piece after another, and then again there would be times it would come slower; you couldn't describe it because it was irregular; it wasn't one continuous rush of lumber like a waterfall, but it was practically continuous; there were three other men, all men older than myself; I was the most active of all; I did as much work as any of them; I believe I was practically a man grown as far as my body is concerned. I was strong

(Deposition of H. C. McCann.)

enough to do the work that these other men were doing.

I have never thought how long it would take to load a truck, one of those hand-trucks, so the lumber would be right to get up on. I have loaded those push-trucks of lumber. If you had the lumber right there, just simply had to pile it on, I suppose I could load a truck in as much as about fifteen or twenty minutes. It would take some time to unload it, it depends on the size of the lumber. It was generally more convenient to go up over this dog-roller than to go up on a truck. I have not been in the mill since this accident. I have testified about the way the machinery [124] was operated; those were all things that I knew myself; I knew myself in a general way how the mill was run, and knew how the machinery was operated; I never had any experience before this. When I went to work there, I studied the machinery and went to the man in charge of it whenever I didn't understand something about it, so that I understood the general operation of the mill. Before the accident I had a number of minor injuries such as any boy might have; I had a nail in my foot.

Recross-examination.

(By Mr. HAINES.)

This trimmer was inside of the mill; that is, right on the edge of the mill when it drops off the trimmer outside the mill. The edge of the trimmer shown in the photograph is virtually in the outside wall

(Deposition of H. C. McCann.)

of the mill; one man looked after the trimmer and he is inside of the mill; just before the lumber comes through the trimmer it goes through the edger and two men look after the edger; the next process is the carrying of the logs by the band-saw. If we men on the outside of the mill saw a jam occurring and wanted to notify the trimmer, we would have to get up on either one of the tables and signal to him, if we just happened to catch his eye; he could not hear us if we shouted; they would do it by signals. He could not hear us on account of the noise of the machinery and the running of the mill. He is away at the other end of the mill from the carrier of the logs and the band-saw; I should judge the mill is about one hundred and fifty feet from the band-saw, and he would be that far away. We could not see the trimmer from the [125] ground, from platform F. We could see him from the carrying-table, platform B. We would have to get up there to call his attention to the fact of the jam occurring. He could not see the jam occurring on the push-table from where he stood; when the trimmer stood at the place where he worked, I do **not** believe he could see a jam occurring, down on the push-table. I recollect instances where the jam got so bad he had to be signaled to to stop; he would keep sending the lumber down, and I would start to signal to him. I would throw something over to him, a block, to draw his attention and have him stop. An instance of when I did that, I was on the ground, busy clearing away the lumber that had

(Deposition of H. C. McCann.)

come down that was on the carry-table, and there was a jam coming on both tables, and I called his attention to it, and it was piling up in such condition that we could not get the lumber out safely without having the trimmer stopped, so I got up on the carrying-table and got his attention and had him stop, and we got this lumber out as quick as we could and had him go on with his trimming. We could not make him hear by shouting on account of the noise in the mill.

If we got these trucks loaded up we would lead them away; the men that was loading cars, when they run out of work they would go out with them, so the work was divided between us four men and the men who were loading on the car.

When I directed the attention of the trimmer upon these occasions where a jam got too bad to be released and they stopped the delivery of lumber, the mill did not stop, just stopped putting lumber in and passing it over on the push-table [126] until the jam was released; the lumber would accumulate on him at that time and crowd up on him and greatly push on his table, and if he stopped for a moment delivering lumber over on the push-table that would make an accumulation, it would hurry the process when he commenced again, then there was a rush.

This machinery that was put in during the interval when my employment stopped and before Mr. Kelty re-employed me was the push-table and the carrying-table; they had not been there before;

(Deposition of H. C. McCann.)

they were the new machinery. They had been there about two weeks before this accident occurred; I had worked during those two weeks, and it was during that two weeks that Mr. Kelty ordered me to get up and clear out the jam. Both the push-table and the carrying-table had been put in during the interval I was not employed there, and had been there only about two weeks.

Redirect Examination.

(By Mr. STERRY.)

I had been working ever since they had been put in at this same work.

Recross-examination.

(By Mr. HAINES.)

There had been no accident of this sort occurred during that two weeks to anyone. There had been nothing special to call attention to the dangerous character of those appliances, this dog-roller.

Redirect Examination.

(By Mr. STERRY.)

My eyesight and hearing was perfectly good.
[127]

The picture attached to and referred to in said deposition and marked as Defendant's Exhibit I is hereto attached and made a part hereof and marked Exhibit II. [128]

TESTIMONY OF PLAINTIFF CONTINUED.

**[Testimony of H. C. McCann, in His Own Behalf
(Recalled—Cross-examination).]**

H. C. McCANN, recalled for cross-examination, by Mr. Wright, testified as follows:

In the last two weeks I made the drawing which has been introduced in evidence, and marked Plaintiff's Exhibit No. 1. I made it after a thorough examination of the machinery at the Benson Lumber Company Mill. I made the last examination within the last two weeks. I said I had been studying at a correspondence school around the neighborhood of six years. I went to the mill about two weeks ago for the purpose of making measurements from things as it was at that time, and made a drawing as it was at the time of the accident. I went to the mill two weeks ago to enable me to make an accurate drawing of the machinery as it was on the 30th day of July, 1907; not necessarily for the purpose of familiarizing myself with the conditions that exist there at this time, but I wanted to have everything in my mind when I came here to testify, the situation of the push-table, the relative position to the carrying or receiving table, and the trimmer. I went down there for the purpose of refreshing my mind about that, and to enable me to make this drawing. The last time I went down there was about two weeks ago. I have been there previously. This accident was six years ago the 30th of this last July. I had been down there several times; I couldn't say the exact number. I was in the hospital, I think, about

(Testimony of H. C. McCann.)

five weeks after the accident. I went down there some time after the accident. I have been down there a number of times since the accident. I walked on crutches for a while. I believe I did go down to the mill before I discarded the crutches. I don't remember what I talked over with the [129] employees at the mill. There were three other men besides myself at work at the time of the accident, on these tables. Their names were Coffin, Smith and Colompy. They were doing the same labor that I was performing. I don't know how long they had been employed there, or whether they were older employees than myself. I don't know whether they were at work at the Benson Lumber when I was employed, or not,—I don't remember. I don't remember whether any of them were employed and came to work after I began to work there, nor do I recall going down after the accident while I was still upon crutches, and talking the matter over with them. I remember going down, but I don't remember whether I talked it over with Mr. Smith or not. I don't remember that Mr. Smith came up to the hospital, and I don't think he did. I do not recall that Mr. Coffin came up and talked the matter over while I was in the hospital. I do recall having talked over the circumstances connected with the accident, with an employee at the mill, since the time of the accident. Some time afterward I saw Coffin,—I think it was at his house. I cannot say how many times I have been down to the mill since the accident. It was some time after the accident before

(Testimony of H. C. McCann.)

I could take employment anywhere, and I went down to the mill before obtaining employment elsewhere. I cannot say whether I went down, once or twice, or several times, but I remember very distinctly that I was down there. I did not go down necessarily for the purpose of making measurements of the machinery, the push-table and carrying-table, nor did I make measurements while there. I don't know exactly when certain changes were made in the push-table and the carrying-table and the various devices there [130] for handling lumber. It was a short time after the accident though, that some of the changes I know of were made. When I first returned to the mill after the accident, some of the changes had been made. The push-table had been raised—I mean the carrying-table had been changed, and the men were hauling the lumber from below, instead of up on top, as they were at the time I was there. When I first went down I don't remember whether any change had been made in the push-table or not. It was within the last two weeks that I made the measurements of the push-table and carrying-table and the platform, the trimmer and the skid. Before the changes were made I had not made any measurements of the mill.

In regard to my estimates of the length of the push-table indicated by the letter A in the model, and of the length of the carrying-table indicated by the letter B in the model, and the height of the push-table from the platform before the changes were made, although I made no measurements prior

(Testimony of H. C. McCann.)

to the change, the way I am satisfied with them was that I knew the length of the carrying-table. There was a certain size of the lumber that would go over that, that could not come out over the trimmer, and that took in just about half of the push-table, the push-table having five rollers on set at a square. That is, they were four feet long and four feet apart, would give an estimate there. As to the height of the push-table, I judged by my own height. I have already testified as to the height of the push-table prior to the alterations, because I remember its relative height to me at the time I was working there. I was five feet seven at that time, and my present height is five feet ten. My weight at that time was about 140, [131] and now it runs 170. At the time of the accident, the push-table indicated by the letter A in the model was about as high from the platform as I was tall. The distance of the push-table from the carrying-table at that time was approximately two feet. I don't know as the workmen were supposed to stand between the push-table and the carrying-table. They did not stand there. I went in there between those two tables while the machinery was running. It had been five weeks since I was first employed in the mill, but I had a week's lay-off between that time. I had been through the mill prior to the accident. I knew where the saw-logs were taken from and carried up to the sawyer. Roughly, I knew the entire process then as well as now. I was practically as familiar with the machinery of the Benson Lumber Company

(Testimony of H. C. McCann.)

Sawmill at that time, except I didn't know the measurements. I knew the general course as to how the lumber was handled, how it was carried up to the trimmer and carried down the skids to the table, and then lengthwise on to the receiving-table, and then loaded from there on the lumber trucks or lumber buggies, and disposed of. I had been through the mill.

I knew some of the measurements then. I hadn't made them; I didn't need to. They were measurements that were laid out on the different machines themselves. This machine was built while I was in the employ of the Benson Lumber Company, that is, the push-table and carrying-table. I was already working there prior to their construction and use. I was not about the mill during their construction. There was a period of about a week during the construction of those appliances that I was not at work. This push-table and carrying-table was put in during that time. I don't believe I was down there [132] during their construction at any time. During the week I laid off; I had a vacation. If I had gone back, it would be simply to see when we were to start running again. I don't recall whether I went back,—I may have gone back the latter part of the last week, and that is the time they told me to come down Monday. Maybe about a day before I might have seen this machinery that was installed there during my vacation, before it was actually in operation. It was new machinery. I just took in the general scope of the new machinery, that is all.

(Testimony of H. C. McCann.)

I am interested in new things. Interested enough to become a student of mechanics, and take lessons in this kind of work. I suppose I could say I was interested in mechanics. I believe those things interested me a little more than ordinary matters that mechanics have to deal with. When I went down there and saw this machinery, I don't believe I examined the spike-roller or dog-roller. When the machinery started running, I found out the purpose. I didn't know the purpose before it started to run. I knew this machinery was for the handling of lumber, but what the purpose was I didn't know until after the mill had started running again. The elevation of those rollers, including the spike-roller, above the level of the surface of the push-table, is about one inch. I measured those heights. I measured them in the last two weeks, and previous to that I knew they were just that height, because when an inch board, a short end, would fall down in between the two rollers it would be just sufficient to hold any other board coming down on top, hold it just a little ways away from the roller. To my knowledge the rollers are the same as they were at the time I was injured, and the same height above the surface [133] of the table. The spike or dog-roller is the same as it was when I was injured, with the exception of the spikes, they have worn down considerably since then. That is not the only change I have observed. I observed that the board right directly in front of the spike-roller was not there. That is the board that I marked X on the model.

(Testimony of H. C. McCann.)

That board is removed from the spike-roller about an inch and a half, to estimate the exact distance, or maybe two inches,—in that neighborhood. In regard to the distance from the cylinder or the spikes under the roller as they came around, it was left just clearance enough from the spikes for them to clear, maybe an inch and a quarter or inch and a half, maybe as close as an inch, it might have been. The exact length of the spikes I don't know. They were about an inch long and the board was about a quarter of an inch from the edge of them. The spikes were irregular in length, and averaged from about three-quarters of an inch to maybe a little over an inch. I think there was about a quarter of an inch space from the end of the longest spike to the board, but I couldn't say, because the board was never in after I was down there. At that time that board was not part of the frame. As to how near to the top of the dog-roller or spike-roller that board projected, it came up within about on a level with the table itself. I believe it was about an inch below the cylinder of the roller itself. I think the elevation of the upper edge of the board that is marked X on the model was on about a level with the surface of the table, so that it left about an inch space between the top edge of that board and the top of the roller. I was employed—I don't remember as to where I was employed the first time, and then after the lay-off, Tim [134] Kelty put me back to work, being he was my foreman before the lay-off. Mr. Tim Kelty was foreman, that is, of the portion of the mill in-

(Testimony of H. C. McCann.)

cluding the carrying-table and push-table, and he had charge of the logs out in the bay; I think he had charge of that. I couldn't say as to whether he employed me in the first instance—I was employed by the office. I went down and made application for a job—if I remember right, I went to the office and was employed, and who put me on I couldn't say. Prior to the accident, once or twice my work was out on the logs, out on the bay. I was put out there. That was when I first went to work. I worked there only just a half a day or something like that. There would be times there would have to be extra work done out there, I would be sent out to do that work. I also worked on the raft. That is one of the large rafts that brings the logs down. I think I put in a few hours one day along there at the edge of the trimmer. The board partition just simply comes down to the roof, just a short distance, and leaves all open below that. The board wall comes down and leaves a space, and down below the trimmer it is all *board* up, if I remember right.

In regard to the photograph which is marked Exhibit 1, attached to the deposition which has been read in evidence by my attorneys, that is a correct representation of the plant at the time I was injured. Letter "A" was to represent the whole table, the push-table. The board or frame where the letter A is, looks like a portion of the frame around, the boxing, the end part of that shaft. The shaft that ran alongside of the push-table turned all the rollers, on the push-table; and also turned the spike-roller or

(Testimony of H. C. McCann.)

dog-roller. As to which is the [135] correct name, the dog-roller or the spike-roller,—I always knew it by the name of dog-roller. That portion of the table represented by the letter C is the dog-roller or spike-roller. The board or portion of the board in front of the dog-roller is correctly represented by the photograph, with the exception of being chewed out on the top. It does not come as near the surface or as near to the surface of the push-table as the dog, because the lumber dropping down would keep breaking it out and chewing it off. Except for that the photograph gives a correct representation of the push-table as it was. As to whether that is the only exception, there might be some other changes, technically, I couldn't say. There are no details. At the present there is nothing that attracts my attention.

I testified the letter F in the photograph indicated the platform on which I worked. I couldn't say whether that letter F does not represent the lumber on top of one of those lumber buggies. I have not looked at the photograph. If the photograph shows something on that end, I can't see what it is; it does not show the platform here out as it extended at that time. There are only three boards in the photograph. I can't say whether the third board seems to be the end of it, because it runs off the photograph there. The platform extended clear across to the other platform. You start at that platform and walk clear over to the railroad track. That it is in the northern direction, to the east from

(Testimony of H. C. McCann.)

the push-table the platform extended 10 feet, so as to get plenty of room for two push-carts or lumber buggies. They ran alongside each other. There was one at each side and I walked in between [136] them. When I went up on this push-table, I went up from the platform there. When I say platform there, I mean the platform indicated by the letter F in the exhibit. When I wanted to go up on the top of the push-table, I stepped up on a little platform between the carrying-table and the push-table which I testified in regard to in my direct examination. It was my habit, when I wanted to get on the push-table, to step from the platform F on the small platform, being between the push-table and the carrying-table. From there I stepped up on the carrying platform, the carrying-table, and from there to the push-table,—I jumped up on the push-table. From the carrying-table or receiving-table indicated by the letter B I jump or step upon the push-table indicated by the letter A in the model, and also in the diagram. I would call it a good, big step from B to A, that is, from the carrying-table to the push-table. I never had time to measure how long it was; I should judge it was about three and one-half feet, around in that neighborhood. I made a quick step. In other words, before one foot had entirely left the carrying-table, my other foot was upon the push-table. As the machinery was situated at that time, if necessary you could stand with one foot upon the carrying-table, the other foot upon the push-table. I never tried it. The height of the surface of the push-table was

(Testimony of H. C. McCann.)

about two feet above the height of the carrier-table. I would mount the push-table while the machinery was running. The lumber would be coming down. If it happened to be coming down you would have to watch out for it. I would have to watch out, that is, take the stream while there wasn't any ripples in it. That was the most frequent way I had of getting [137] up there,—that was the way that was generally used. We all used that,—all the workmen that got up there. Different ones got up there at different times. I wouldn't say I saw them all get up there. I saw Coffin get up there, over the roller, and while the machinery was going. He got up there to clear out some lumber up there. I can't say how long it was before I was hurt that I saw him get up there. Mr. Coffin was my partner to work with, you might say,—had the same labor to perform, that I had, and the same that the other two had. There were four of us working at that time, and we were working in pairs. Coffin and I constituted one pair, and Mr. Smith and another gentleman constituted the other pair. And the two pairs worked together.

In regard to this model, I couldn't indicate just where, on the model, I was standing, and where Coffin was standing, and where Smith was standing, where they worked the day the accident occurred. They were some place on this platform. As a rule, they stood up on this end, the south end, of the loading platform. I couldn't say exactly who stood next to the push-table. You stand around there, in different places, wherever we could efficiently do our

(Testimony of H. C. McCann.)

work. My duty was to remove the lumber which was coming down, the continuous stream from this receiving-table on to the car. That was not all my duties, but the principal part of the work. I couldn't say that I stayed in any particular place. As to getting in each other's way if we went about picking up lumber, we would have to pick the best place. Only one pair is handling a piece of lumber, then the other would take the next one. When a plank came down one would start and pull it out, and the other [138] one of the pair would take the other end and load it onto the truck, whichever truck it had to go on.

Q. Of the four men at work, there was *only* of the four stationed at or near the south end of the push-table? A. Not stationed there.

Q. Was there any one that was there a greater portion of the time?

A. I generally stayed there, and Coffin stayed there, that is where we had to work.

Q. You were working in pairs, and the pair you were working with on the 30th of July, in the afternoon, was working on the push-table?

A. We all worked on the far side of the carrying-table. It would come there, and that is as far as the lumber would come. I worked from the carrying-table. I didn't work up on the top of the carrying-table. Frequently I got upon there. They told me to get up there. Kelty told me to get up there. He didn't tell me frequently, but he told me to. It was necessary to get up there. It was necessary to get

(Testimony of H. C. McCann.)

up on the carrying-table to get out different pieces of lumber that would come down either crooked or in various kinds, that would interfere with the general run of the machine. I had a picaroon to enable me to get the lumber started that was on the carrying-table. With the use of that I could not entirely avoid getting up on it,—I couldn't reach the 20 feet, which is the length of the carrying-table, with the picaroon. Those who were employed with me, the fellow-servants, frequently got up on the carrying-table also. I couldn't say that all of them got up there frequently. I know that they got up there, but as to [139] how often, or anything like that, or which ones I saw up there—the only one I know I saw up there was Coffin. He got up there quite frequently. I would not say I heard Mr. Kelty tell him he should get up there. I did not tell him to get up. Coffin never asked me to get up. After I moved the lumber from this carrying-table, I put it up on the push-cart or lumber-cart.

As to the location of the push-carts, one would be as close over to the push-table there, on the east side of the push-table, and one on the east side of the loading platform F. It would stand in there. That is, the one stood in next and close up to the push-table, and the other stood just far enough away to leave a passage between the two for the workmen.

Q. In your deposition, you speak of a horse in connection with those push-tables. That was a wooden support, wasn't it, for the lumber?

A. There was a wooden support for one end of the

(Testimony of H. C. McCann.)

push-cart, to hold up that end, being it only had a bearing of two wheels, and it would be going all over. These push-carts consist of a frame and axle and two wheels. The push-carts were about two feet high. I didn't measure them. When I say they were two feet high, I mean about as near as I can remember two feet high to the top where we started to put the lumber on. Practically that is not two feet up to the axle. The axle, as near as I remember, was about a foot. The wheels were, in my opinion, about two feet in diameter. The wheels were not narrow; they had a broad rim on them, and were in width, four or five inches, something in that neighborhood. There was a [140] steel band on them and steel spokes. I think the hub was flush with the surface of the band. As to the cross-pieces of the frame extending out five or six inches beyond the general frame, I couldn't remember. I know they extended out flush with the rim of the wheels. As to whether they extended over that or not, it wasn't very much if they extended over at all.

We piled these carts or trucks up reasonably high with lumber, something about in the neighborhood of sometimes four feet high on one of them. At times I mounted this push-table from those cars or trucks. I don't know exactly why I did not mount from one of those trucks on the day I received the injury unless, if I remember rightly, there was a truck there, a load so high if I once got upon it I would either tip down one end and dump off all the load, or pull half the load off on me if I jumped to get up

(Testimony of H. C. McCann.)

on top. That is a kind of a recollection or impression, I suppose.

Q. You don't recognize any difference between the two. Do you recollect, as a fact, do you recall, looking back to the 30th of July, 1907, have you a picture in your mind of that truck piled so high with lumber that you were afraid of it falling if you would get on top of it?

A. No, I haven't it in sight. I would not say that was a fact. I do recall there was a truck there. I believe I looked at the truck before I started to get up. My back was turned toward the truck, and I was facing the carrying-table at the time the jam started on the push-table. My attention was called to that jam for the reason that we were continually on the lookout for lumber, for a jam being taken up of that kind, and there had not been any lumber for a short spell there, and I [141] was looking out, looking around for any jams or what was stopping it. I don't recall that Mr. Coffin called my attention to the fact that there was a jam up there. I don't recall that he said anything to me about it. It is not a fact, and I don't recall that he asked me to get up on the table here and stop and remove, or relieve such jam. I do not know whether he spoke to me at all at that time. Mr. Coffin helped me at the time of the accident to remove my foot from the spike-roller. That is the man who was working with me. As to whether he was standing along side of me at the time I started to remove that jam, I couldn't say his position. He was there on the platform. That is, he

(Testimony of *H. C. McCann.*)

was down on the platform F. I don't think he was nearer the push-table than I, at the time. I was near the platform; I was nearer the push-table. I recall that I was nearer the push-table than Coffin. He was then standing some place to my left, to the east of me, and maybe northeast or something like that. The stream of lumber ceased then for a short time, and that is what called my attention to the fact that there was a jam upon the push-table. I was continually on the lookout at any time for any jam like that; even when the lumber was coming, we had to keep looking out for some stoppage that would come like that. That was not particularly the first that attracted my attention to the fact that something was wrong,—that the constant stream of lumber had ceased. We were continually on the lookout for it.

Q. I want to get at the fact whether you turned around and saw it or whether the lumber had ceased coming?

A. I turned around, saw the boards, yes, while I was standing on the platform. [142]

The board that came down was lodged across, having one end in this side part of the frame, which is higher than the roller, and came across this frame and was in here.

Q. In between these two?

A. Not in between here. It had a bearing on the roller and this roller continually turning, held it up in there tighter. It continued over the roller, in under the skid marked G on the model. The pair of skids were further this way. They were not all in pairs,

(Testimony of H. C. McCann.)

maybe one at the end in pairs, and then three or four together, and so on; they were not uniform. The skid under which the piece of lumber was caught on that occasion was, I would say, about seven or eight feet from the north roller. Between the south skid and the one on the side was six feet. (Using model for illustration.) I stood up on the platform F at some place about in that corner, and turned around and saw this, by turning around and raising upon my toes, I saw this board which was lodged in there, and turned around and stepped upon this small platform between the push-table and the carrying-table, stepping from there upon the carrying-table, and from the carrying-table I stepped on to the roller, on to the platform. I was in the act of stepping over there, and the next thing I knew, my foot was caught and pulled in between the [143] roller and the board, and the roller coming down, chewed up my foot. I couldn't say whether I was up on the push-table or not, when I was caught. It was in the process of trying to get up on it. This board, which I have testified of being laid on the push-table, was lying flat on the push-table, and I could stand here and see it lying flat upon the push-table. (Indicating.) There is not a roller here; this is an endless chain, a chain made up of different parts, links of steel, which has a raised part such as that. (Indicating.) This is a carrying-table. It is not a roller—it is a chain. This chain moves here; it carries the lumber sideways.

Q. How far up in the end of this chain is the end

(Testimony of H. C. McCann.)

of the carrying-table?

A. It is around the neighborhood of eight or ten inches around, I guess.

It would not be dangerous if you would step on this chain. There is no danger in that other than that carrying you sideways, carrying your foot out from under you, because these lock together; there is no boards or anything can get under between them; they are handled with small blocks, and when they come up, they lay flat. It is about a foot from there to there. Between the chains. It was about ten inches or a foot.

I can't say whether my foot caught in there as I went up or whether I stepped clear up and my foot slipped back in again. It was all done so quick I can't form any opinion. The whole transaction only occupied a very few seconds. As to which side of this moving chain I stood on when I started to mount, as a rule I kept right upon this edge along here. As a rule, I stepped upon the edge. I didn't observe the technical part of the way Mr. Coffin got up. He went up that way, while [144] the machinery was moving. When I started to get up, I think the carrying-table was absolutely free of lumber. There was no lumber coming down. I did not speak to anybody before I started up. I didn't tell anybody I was going to go up. I did not make any effort to stop the mill before I started up. I had been up there many, many times before. Practically always went up the same way. I believe I had mounted the push-table while this continuous process

(Testimony of H. C. McCann.)

of moving the lumber was going on. There was danger of having your feet knocked from under you by the timber that was coming down, if you jumped up in that way. I don't think I appreciated that fact at that time. I knew that roller was revolving. As near as I can remember, the roller made about a hundred revolutions a minute. I never gave any thought to whether or not if I put my foot in there it would knock the teeth of the roller out.

Q. You knew that, you didn't have to think of it.

A. I didn't try it.

Q. There are some things you don't have to think about; didn't you know, without stopping to think, if you got your foot in there that it would not hurt the roller?

A. I know it now. I didn't stop to think about it then. I suppose I knew it. Most likely I knew if I got my foot in there it would be injured. I don't see how you can expect me to state that I knew if I got my foot in there I would be badly injured, at least would be injured, when I never gave it a thought at the time. I suppose I ought to know it if that is what you mean. I knew the board X in the model was there. I never attempted to put my foot on that board by stepping on the carrying-table on the board and then over.

When I have given the distance as two feet from the [145] carrying-table to the push-table, I mean that portion of the push-table right to the edge of the roller. The diameter of the roller is six inches. The space between the board marked X and the extreme

(Testimony of H. C. McCann.)

south end of the platform or push-table is about nine inches. In order to land safely upon the platform and not be in danger of getting my foot in the roller, I had to clear that roller entirely. And it extended out about an inch above the surface of the platform. I had to step two feet up and two feet and at least nine inches, in order to clear it. I didn't estimate whether that would make a step of about three feet; it is simply a long quick step from about two and one half feet, I think I said, something like that.

(Referring to the photograph.) I knew what the piece of lumber or timber that stands upward from the platform known as the push-table was. It was a piece of pipe. It was an iron pipe. That was there the time of this accident. I don't know how far from that iron pipe the boards letter A on the photograph are. I would judge the distance about a foot, a little less, maybe. In mounting the push-table I didn't mount from the carrying-table up over the push-table, instead of going up over that wooden roller, using that as a hand-hold to carry me up, because there is nothing there to step on. That is a foot, that stands out about a foot, but the board is up edgewise. There is nothing to hold the board there, and this revolving shaft is there. It comes down to that roller; it is revolving the dog-roller, and the plank is on the inside of the dog-roller. I never tried it. I don't know whether I could or not. There was no hopes of it; there is nothing to hold up anybody that would stand on it. As near as I can remember, the size of that [146] timber was one

(Testimony of H. C. McCann.)

inch. I have a good recollection of it; it was one-inch frame up all around the lower side of this shaft. It was a piece of lumber one inch thick. I couldn't say as to how wide it was. I never put it to the test to find out whether it was securely nailed to the frame. It was nailed.

Upon stipulation of the parties, the Court directs the jury to inspect the premises under charge of the bailiff, an officer of this Court, and the Court appoints Mr. Dillard as the person proper to point out the changes and answer such questions as the jury may put to him, concerning the mill, the attorneys for each side to accompany. [147]

Cross-examination of the Plaintiff Continued.
(By Mr. WRIGHT.)

I visited the scene of this accident on Saturday with the jury and the rest of you. I would say the distance at the time of the accident, between the carrier lettered B on the model and the outer edge of the push-table letter A, was about two feet.

Q. I will ask the question again. I want the distance, as near as you can state it, from the extreme edge of the carrying-table next to the push-table, to the edge of the push-table, next to the carrying-table, and over the dog-roller.

A. "And over"; I didn't understand that part. About a foot and nine inches. The elevation of the surface of the push-table above the carrying-table was two feet. It has been lowered about a foot. On the 30th, when I attempted to mount the push-table over the roller, before doing so I did not hear anyone

(Testimony of H. C. McCann.)

speak at all. I received no directions. It was the fore part of the two weeks before that when Mr. Kelty ordered me up on the push-table. I had been working there about two weeks, and the first few days of those two weeks he gave me no orders. That was the only time I was ever ordered on the push-table. Mr. Kelty remained there until I had mounted the push-table. He did not tell me how to go up at that time. He did not tell me in what manner I should get up on the push-table. I got up on the carrying-table, and from there up over. I think some of the employees other than myself and Mr. Coffin went up that way, but as to which one I can't recall positively. I generally performed the service of clearing away the clogged lumber or jammed lumber up on the push-table. On this occasion when I was injured, I testified that I stood on my tiptoes down on the platform and was able to see it, that is, to see the piece of lumber caught between the two skids, and lying flat upon the push-table, and the [148] upper edge of the board was caught and rested against the easterly edge of the push-table. At that time there were two hand trucks on the platform. There was room between those so I could get back. I could not say positively why I did not go back upon the platform and attempt to relieve the jam on the platform. As a rule, we had that truck there; it was loaded with the log lumber. I could get back between the two trucks, but the lumber was so long it extended away over the end of the push-table. It extended clear beyond here. It did not extend clear up here; we

(Testimony of H. C. McCann.)

would have space enough in here to work. I am not positive if it extended beyond at that time. I have no definite recollection. I did not try to go back that way. I don't think I had any picaroon at all. I had one with which I generally worked. I had not done anything with it. I left it there at noon and when I returned it was gone. I left it some place about the machine, right around that vicinity. I would say that is my impression, because I would not leave it any certain place, but right there at the table. I had no place, when I quit work, where I left the picaroon before that. When I left for noon, the mill was closing down. During the noon hour the mill was not in operation. I returned that day before the mill was put in operation, about the time the whistle blew. I am not positive whether or not I asked anyone for the picaroon. The first thing I commenced was to look for it. I looked for it right around there on the table, around that platform there; around the carrying-table and the push-table. I don't think I had time to look anywhere else, if I remember right. They were closed down for noon for an hour. I had my luncheon there. [149] I was there during the hour it was closed down. I generally go away up on the other side of the mill to eat my luncheon, maybe on the bay side, or over in the yard, in the shade, or a cool place. I did not spend any portion of the hour around the mill, or around that portion of the mill where I was employed. When I came back the picaroon was missing. I don't believe I asked anybody where it was.

(Testimony of H. C. McCann.)

I am not positive of that fact. Before this time I had never stopped the mill in order to clean off or clear away the lumber jammed on the push-table; but I have stopped the trimmer. When I stopped the trimmer, the stream of lumber which I have described ceased to come down on the skids over the push-table on to the carrying-table. The stopping of the trimmer stops the lumber coming; it does not stop the machinery at all. I did not make any effort on the 30th, when I saw this jam, to stop this trimmer. I had stopped it before. I didn't stop it on that occasion because every time we stopped it accumulated the lumber on the trimmer and made it harder for the trimmer, so it was always our effort to keep our part going without interfering with the other man's work. When I saw the jam on the push-table on the 30th, the reason I did not stop the trimmer was because I knew it would cause an accumulation of lumber on the trimmer, and I thought about that and took the other means. I went ahead to clear it out. Generally we had time to clear it out before any jam comes from the trimmer.

Q. As soon as your attention was called to this jam, you turned around and saw the lumber buggy or hand truck was so piled up with lumber that you were afraid to get on top of it [150] and also then you stopped and thought about the trimmer, that you did not want to cause an accumulation of lumber there, and having those things in consideration, you jumped on to the dog-roller?

A. I don't say I thought of all of them. All this

(Testimony of H. C. McCann.)

would take time. It had become a habit of not stopping the trimmer unless we just had to. I don't know as I actually saw the lumber buggy or that it was piled up with lumber, and noticed it there. I did not state positive that it was so piled with lumber that I was afraid the lumber might fall off. I said, "If I remember rightly it was that high." I think I remember correctly about that. My best impression and best judgment now is that it was so piled up, and that is the reason I did not attempt to get up in that way, and I was afraid that I would be injured if I attempted to get up on that lumber by the falling off of the lumber.

Q. You knew that if the lumber did fall off with you on top of it that you were likely to get hurt?

A. I don't know as I gave so much thought to that as to the fact that the lumber would fall off, and that was all there was to it. I don't know as I knew at that time that if it did fall off I was likely to get hurt. I don't think I appreciated the fact that if that lumber fell off with me on top of it, I was likely to be thrown down on the ground and be hurt. If I had any occasion to think of it, I most likely would appreciate the fact that if the lumber fell on top of me I would get hurt, but I never gave any thought to anything like that particularly.

Q. You appreciated if you put your hand in that revolving [151] dog-roller, it would get torn and get hurt, did you not?

A. I never gave any thought to that either. If I had thought, most likely I would have known it. I

(Testimony of H. C. McCann.)

never had any occasion to think of it.

Q. You had occasion to go up over this revolving dog-roller, didn't you have occasion to think of it then?

A. I didn't see any occasion at all. The time Mr. Kelty told me first to get up there, it did not occur to me that I might get hurt, and it never occurred to me that in making that leap up about three feet that I might slip and fall on the dog-roller. That never occurred to me. It never occurred to me that in getting up there, if a piece of lumber came down and struck my foot, it might cause me to fall down and my foot go into the spike-roller. I know the dog-roller was revolving. I knew it had teeth in it.

Q. You knew if anybody put their foot or hand in there, it would be injured, didn't you?

A. No, I never gave any thought to it. I certainly fell many times during my life. I suppose I have slipped and fell. I don't know that I was much more likely to slip and fall working in and about a machine such as I have here, and jumping from a narrow edge than I was from the level ground, upon a smooth surface. I really couldn't say that. I would be a little more careful in working around a machine such as this than I would if I were walking out on the sidewalk, but the chances are that if you slipped, you would fall much quicker on the sidewalk, not expecting anything to happen. You handled that work different than what you would on the street. I don't say as I realized I was more likely to get [152] hurt here than I would if I were playing

(Testimony of H. C. McCann.)

baseball, for instance. I appreciate the fact now that I was more likely to get hurt here than I would if I were walking on the road, but I don't know as I did then. I never had any thought of it in any way, shape or form. I thought it was possible to get hurt in various places, but I never gave any thought to any particular place or anything.

I had not sustained any accidents in or around the mill of any kind before. I had not had any accident that I would consider serious prior to that time. I had had accidents before. I didn't think anything about whether any man was immune against accidents; no matter where they are, there is no insurance against accidents.

No employees of the Benson Lumber Company at any time had ever given me any caution about mounting the carrying-table or push-table. No one connected with the mill had ever warned me, either directly or indirectly. I had never heard any employee working with me warn me against getting on the push-table or carrying-table. Mr. Coffin or Kelty never said anything to me about getting up on those tables. They never cautioned me, that is what I took the question to be. I was able, where I was, to call up to the operator in charge of the trimmer, but not to make him hear. From the position in which I was at work on that day on the platform I would not be able to get in communication with him; I never did communicate with him from there. I did not know of anyone communicating with him from there, not from where he worked. I could see the operator

(Testimony of H. C. McCann.)

of the trimmer from the carrying-table. I could not say whether I could see him from this intermediate platform between the push-table and the [153] carrying-table. I have gotten up there. I do not know what this board which was immediately in front of the spike-roller was for. I was informed afterwards that it was there for the purpose of avoiding getting your clothes in the teeth of that roller when you got up on the platform, but I never knew it at the time. I couldn't say what this platform was for, that is, the platform between the carrying-table and the push-table. I did not frequently get on that with my picaroon in order to get a better reach over the carrying-table from the push-table. I don't think I ever did see anybody get right up on that table.

I said that all the lumber that was delivered on the carrying-table was taken off by myself and my co-laborers and laid on these carts. I couldn't say what kind of lumber was being loaded on those carts the day on which I was injured, it was mixed lumber; that is, lumber of various lengths and various widths. I couldn't say positive that some of it was 12-inch boards, but I should think it was; and some of them narrow pieces, simply as it came from the saw. As it came we piled it up on these push-carts. The lumber, in being loaded in that way, might act as a binder and prevent the load from falling off, if it would get mixed up in such a manner. I have seen part of a load of lumber fall off of one of those carts. I couldn't say positive how often. It could

(Testimony of H. C. McCann.)

happen in various ways. One end of the truck going down and hitting the floor, that would raise up part of the lumber. I said we had a horse under one end of it, but you can't get that horse under it while you are wheeling it along. It is always under it when we are loading. If it happened to be loaded too heavy on [154] one end, it would fall down when it was standing still, and part of it fall off. I cannot recall positively how high the lumber was on the carts at the time of the accident. There was lumber on both carts at that time. We loaded them according to the different grades and different sizes of lumber, we loaded in that way.

Q. Now, in your direct examination, you stated, if I recall correctly, that on one previous occasion you signalled the trimmer, and had him stop the trimmer. Do you remember when that was?

A. I am not positive. It was not just once, maybe several times during the two weeks. I signalled to him by getting up on the carrier-table and throwing a block over to him. When I got up on the carrying-table, I am not positive as to right where I would stand on the carrying-table. I would simply get up on there. Sometimes we had to stand on the end of it, but I don't know as it was to call his attention. We had to work along over that table. On this previous occasion, I stood on the carrying-table and signaled to the trimmer to stop. I did that by throwing a block of wood at him. I signaled him to stop because the lumber was in such condition there that I couldn't get it clear otherwise unless he did stop.

(Testimony of H. C. McCann.)

I knew by previous experience that I couldn't clear it. I had to use my own judgment about that. I didn't signal to him in the same way on the 30th because a board like that, a single board, could be generally got out. Just a single board there and I thought I could get it out easily.

I have been working with the water company for the last two months or so—the water department of the city. I can't [155] say it was permanent. It is just temporary, as far as I know. I am receiving two dollars and fifty cents a day. That was the same wages I was receiving at the Benson Sawmill. Prior to accepting employment from the water department of the city of San Diego, I worked for about a month, I think it was, for my uncles at house-moving. At present my duties in the water department are working about the yard, cleaning up pipe and painting it. That is the yard out in the park, at 11th and Beech, I think it is. I am working at cleaning up pipe; I have to roll the pipe. Maybe I have to lift it a little bit, light pipe. I testified Saturday that my weight was now about 170, around there, and at the time of the injury it was 140, something in that neighborhood. So I have increased in weight since the accident around in the neighborhood of thirty pounds. I don't have any difficulty in rolling that pipe about. My duties as a house-mover were general work, helping around. I was not handling horses. I should say I was just working around, working with the auto truck at times. I did not run the auto truck. I worked at house-moving

(Testimony of H. C. McCann.)

in the neighborhood of a month. I received \$2.50 a day. I didn't have any steady employment for some time before that. I worked wherever I could, at different places. I worked at different jobs. The last previous job that I had before I worked at house-moving, I think was working as a helper for a boiler-maker down at the Mission Brewery when that was under construction. I worked there about five weeks, I think it was. I received \$2.50 a day. At times I would find difficulty in doing that work. I quit there because I didn't happen to belong to the union, in that case. That is what my employers told me. That is the [156] excuse the employers gave me when I quit. I quit the work of house-moving because it was too heavy for me. So later on I got a job in the water department. I can't think what I did before I worked as assistant boiler-maker. I can't recall what the next job was before that. I might work a day here and a day there so many places. The first job I had after I recovered from the accident, I was running an elevator in the Union Building. I think I received ten dollars a week for working for the Union. I worked there about ten months or eight months, something like that. I didn't quit there, I got let out. My next job was soliciting tourists for an automobile company. I did that around in the neighborhood of six or nine months, something like that. I quit there because the company were out of business.

Q. You were driving an auto, weren't you, and had a collision with a railroad train, which put the

(Testimony of H. C. McCann.)

company out of business; isn't that correct?

A. I couldn't say as to that, what it was; it might have been that, and might not have. It is a fact that I was driving an auto and went in front of a car on the Pacific beach road and had a collision which wrecked the car and injured the people I was driving. What I received from the tourist company varied, from \$1.50 a day. I got a sort of a commission. I have had other jobs than those I have mentioned. I was running a hoist at the big hotel being constructed, now the Cecil hotel, and the Savoy theatre. That was a hoist for hoisting building material up from the ground to the workmen. I sat down the entire time during that labor. I started in, I think, at \$2.25 a day and had a raise to \$2.50. I don't [157] believe I had a steady job until I got up to the brewery since then. I said in my direct examination that I had been studying with a correspondence school. I have been taking the general illustrating course, for the purpose of equipping myself for some usefulness in life. I have been qualifying myself for general illustrating. I have not practically finished my course. I couldn't say how long it will require me to finish it; it depends on myself, how much time I can get to study. Of late I have not been able to study at all. When I am working all day and am tired when I get home at night. My hours with the city are from 7:30 to 4:30, eight hours, and I am so tired and weary at the end of the day's labor that I cannot resume my study. I don't know the exact date when I began this course. It

(Testimony of H. C. McCann.)

was of my own selection that I began this course. I have no difficulty to contend with other than just the time, and the expense attached to it, of course. Outside of that, as far as I know, I am perfectly competent to master the course. I passed my examination so far satisfactorily. It would be rather hard for me to estimate how long it would take me to finish that course if I devoted my time exclusively to it. The course is divided into studies. You have to accomplish so much. I don't know anything about semesters or college work. I couldn't say what I would be able to earn when I have completed that course and would be successful in getting a job; it depends entirely on one's self. Persons proficient in that line get as high as any position, and I have heard it runs away up, and it is low. It varies. I couldn't say what the range of the compensation is. In some cases the cartoonist along that [158] line might receive a compensation as high as \$45 a week.

I do not know why I was discharged from the San Diego Union when I was running the elevator.

When I went up on this push-table, I would not say the lumber was coming down in a stream. The mill was running just the same. It was sawing and the trimmer working. There was nothing to stop it from coming down at the various times you would get upon the push-table. Pretty good-sized sticks come down there. At the time of the accident, the incline of these skids was greater than at the present time, and they came down rather swiftly. There was a bumper over here to keep them from going clear

(Testimony of H. C. McCann.)

off. I didn't realize so much at the time what it was for. I don't say I actually knew at the time what it was for. I knew what the push-table was for, simply to carry the lumber back into position again. I knew what the carrier-table was for. I knew that the lumber came down with considerable force. I knew it bumped up against this bumper out here, to keep it from falling off the push-table. I suppose I did know that if I got on there I would be likely to be hit by the large pieces, and knocked off my feet. I suppose I thought about it most likely.

Q. The trouble was, you didn't do much thinking in those days?

A. I was not much inclined to do much more work at that time than I had to. But I was rather fond of hopping about and showing my ability. That was not the reason I jumped up there to show them how athletic I was. I suppose I was quick and I wanted to make headway in the work, so I could work up into the mill. I never put it to any test [159] whether I could jump further or leap further than the average boy.

Q. How is it you happen to remember so distinctly the measurements of the push-table and the carrying-table and the different ways, and the appliances about the mill and did not particularly take notice of them at the time of the accident or prior thereto?

A. I just took what you would call a rough look at them and noticed the different ones. I was able to tell the exact measurements of those various ap-

(Testimony of H. C. McCann.)

pliances. I knew that the push-table came up about just a little above my eyes. I remember all those things. I remember that push-table, for instance, came up this height, and the length of it was by the trimmer, being it was measured off in two foot-lengths between each chain, each pair of chains, rather. I never made any measurements of the mill and its different appurtenances before these changes were made. I remember now what those measurements were, what the distances were. I knew them approximately at the time. I took no thought at that time to the exact measurements. I never stopped to think whether it was dangerous to step up there or not. I never had any occasion, I guess, to have me stop and think. I never gave any thought to whether there was any danger to get up on the carrying-table or push-table.

These skids extended clear out along the carrying-table, not quite to the end, though, and these big boards came clear down on the carrying-table, sometimes clear of the push-table, the various lengths. I had to watch out for them to see that they did not strike my foot when I got up to that carrying-table.

I couldn't say that I was a boy of a little more than average intelligence. Naturally I thought I esteemed myself [160] a boy above the average. If I had had occasion to stop and think I would have known and appreciated that there was danger.

Redirect Examination.

(By Mr. HAINES.)

This accident occurred something over six years

(Testimony of H. C. McCann.)

ago. I have not been going to school since then. I couldn't say why. I had not the means to go to any school. I could go maybe to a public school and then throw all my responsibility, as you might say, I would be on my parents to keep me. I had my own way to make.

That plank X is not there now. The mill runs without it. I noticed a change made in the skids since the time I was hurt. Just the iron or steel cleat, that is a band, a protection on the top of it where the lumber comes down and hits it. They are longer, because the table has been moved out and lowered. The push-table was moved out three feet, I believe it is. Before and at the time the accident occurred, there were no iron strips on top of the skids. By looking at the photograph annexed to my deposition, I observe that the skids have been gouged or worn out. The lumber moving on these skids had the tendency to wear them out. I testified in answer to Mr. Wright that since the accident this carrying-table has been extended, and there is another set of skids leading from the carrying-table of the size it was then, down to the extension of the carrying-table. The loading is done out in the yard alongside this extension. It is not any longer done from this platform. I know that there is still a man working on the platform F. He keeps those jams [161] cleared out there, that lumber. That is his business. The four men of his that were there had to do all the work of the loading of the lumber and the keeping of the jams cleared, before and at the time of this

(Testimony of H. C. McCann.)

accident. Now one man attends to that. He does not do any loading of the lumber. At the time this accident occurred, this roller shaft was running, about a hundred revolutions a minute, as near as I can recollect. In order to get up there from a push-cart, you would have to get up over that working shaft. This push-table was lowered about a foot since the accident. This platform between the tables was boarded over. If the extension of the carrying-table was not under construction at that time, it had just been practically completed, it had not been in use yet. It was under construction sometime during the two weeks that I was working, but it had not been actually installed and in operation. As far as I knew, it was a part of the plan of the mill. The platform between the carrying and the push-table was boarded over. And if any of the other men had occasion to get up on to the carrying-table, they would step up on the little table and the carrying-platform, and then on the other table.

My ambition was to work into a better position in the mill. I considered then the work would be extremely hard. From the time in the morning, maybe 15 or 20 minutes, or maybe half an hour after that time, my clothes were not dry,—you might say soaked through with sweat, from that time on. The reason I did most of this work was that I had orders to get up there, and then I was, as you might say, ambitious to do [162] the work and make a showing, you might say, so I would be in favor and be promoted.

(Testimony of H. C. McCann.)

As to my health, I haven't the same health I had before the accident, by far, and as to getting about, I haven't that—I lack that walking, carrying me over on to the left foot, all that spring has to be done from the hip, you might say, and I don't know whether it is from that cause, or what it is, but I have trouble with my back in that portion, and I can't carry anything heavy, being I lack that ability to throw myself over from the other foot, to walk, and it is so unreliable, I can't rely on the foot whatever. Sometimes I will be at work and one will break, and I will have to quit work and lay off one week or two weeks until I can fix it up. At times there is very much tenderness. It is very sensitive in parts, and at times it gets very sore from being upon it.

I have been trying to get a correspondence school training.

If this plank had been taken out as it is now, as near as I can say, my foot would not have been caught in that way, it could not have been. It was actually caught between the roller and this plank.

About this picaroon, I said something in my deposition about providing myself with one. The picaroons which the company provided ran in the neighborhood of three and a half feet, or maybe four feet, in length. I provided myself with one with a handle on it about five feet long. I made it longer so I could work more easily on the platform, make the work that much easier. [163]

This table was about five feet and seven inches,

(Testimony of H. C. McCann.)

as I have testified. It would be like trying to go fishing to stand on this platform and reach over with that picaroon and dislodge this board as it was there, you couldn't really say you could do the work, it would be just a chance that it would take some hold on it. These picaroons just have one claw. I had to lay the picaroon aside when carrying lumber and pick them up when occasion arose for reaching lumber on the carrying-table, or whatever use I could make of it. I think this picaroon of my own was a better instrument than the one the company furnished and that is the one that was gone when I got back at noon. I am not positive about whether they use those picaroons out on the rafts; they used most every kind of a tool out there that there was. I do not believe that I ever saw my picaroon after that noon, that is, so I would know it; there are several down there now of the same size, about the same size, but I could not say it was the one I had.

Recross-examination.

(By Mr. WRIGHT.)

I said a few moments ago, in response to a question asked by my counsel, Judge Haines, that I went up there because I had been ordered to go up that way, the order that I have heretofore testified to being given by Mr. Kelty. That is the only order I ever received about going up there.

I could not move that plank with a picaroon, I would have to get clear around, when you stick them in you got to push on them, and the more you pull on it the tighter [164] they go in. I did not try

(Testimony of H. C. McCann.)

to remove it at that time. Being the roller was working entirely against it, the only way I could have removed it would be to get out and shove it back.

Q. You rather liked to get up there so as to show you were active, in order to get promoted?

A. We did not have any time to try anything down there; the work had to be done and had to be done quick.

I could not say whether it was customary when we quit work to put the picaroon between the carry-table and push-table. We were working with it there, we could not keep it in our hands when we were handling the lumber, and we would drop it the most convenient place. We had no regular system, whatever occurred to us right around in that vicinity; every man was his own boss in that regard and did what he pleased.

The revolving shaft was protected by a board on the under side, but not on top. That board might have been almost level with the shaft, or around in that vicinity. It did not come up even, or above the shaft any.

The joints here where the rolling shaft connected with these rollers were not protected by a casing, so that there was no danger of getting my foot into those.

I identified on the photograph a piece of iron pipe that extended up from the corner of the push-table and to the end of the roller. That was there at the time of the accident. It was about three-

(Testimony of H. C. McCann.)

quarter inch pipe, something like that.

Q. Was it solid, put in securely? [165]

A. There was a hole in there and it was down in that hole. I never took hold of that pipe when I got up.

Q. Couldn't you easily have gone up on the push-table from the outside of the roller by putting your hands upon that pipe, could you not have stepped upon the projection there that covered this revolving shaft and gone up that way, without being in danger of getting your foot into the roller?

A. Well, being it is easy,—I didn't form any conclusion; I most likely didn't observe it at the time; that pipe did not extend up very high. The pipe extended up about two feet; I was two feet below here, so the pipe stood up at least four feet from the level where I was standing.

Q. And couldn't you reach up that way and spring up on the push-table without getting on the roller?

A. When I would get on the level, I would be holding on to a pipe down by my feet.

I could not give myself any assistance in that way.

My health is not as good now as it was. I have gained some thirty pounds. It is all according to whether I am able to eat three good square meals a day. I am able to eat. At times food tastes good to me; it is according to what it is; I am not very particular.

As near as I know my circulation is good.

Q. There is nothing very seriously the matter with you now outside of the loss, which is very un-

(Testimony of H. C. McCann.)

fortunate, of your foot.

A. My stomach has never been in the same condition it was before. I could not say whether it is because I do not get exercise. It started to bother me from the time [166] of the accident. It never bothered me before; it only bothered me to keep it filled before, and that does not bother me now. It bothers me to be careful how much I do fill it.

Redirect Examination.

(By Mr. HAINES.)

No officer of the corporation, or foreman, told me when I wanted to get up there to take hold of this iron rod and step there and get up that way. I had no instructions at all from anybody how to get up.

Cross-examination.

(By Mr. WRIGHT.)

No, I never saw other employees mounting over these push-carts. I never saw anybody get up any other way. [167]

Testimony of A. W. Diller [for Plaintiff].

A. W. DILLER, called, sworn and examined on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. HAINES.)

My name is A. W. Diller. I live at 1714B Street, in this city. My occupation is carpenter and building. I made that model which has been used here to illustrate the testimony, at the request of Mr. Winders. He was the superintendent of the Benson Lumber Company. I believe he succeeded Mr.

(Testimony of A. W. Diller.)

Evenson. I think the model, a portion of it, is made on a scale of one inch to the foot. I have examined the mill since I made the model.

The guard-rail on the south side of the push-table A rises above the surface of the table perhaps an inch above the rolls or an inch and a quarter, something like that. I just worked at setting up this machinery for the lumber company. I am one of the carpenters who worked on it. I made the changes after this accident. The push-table was cut down or lowered about twelve inches and moved forward about three feet. The platform F was left as it was before it was moved forward. The skids originally were made of Oregon pine, from the trimmer down to the carrying and the push-table, the Oregon pine being either two or three by eight. Those skids were not topped with iron at that time. I was not right there at the time the accident occurred. I was not on the grounds that afternoon, but I knew about when the accident did occur; my attention was called to it. I was not engaged at that time in making any changes in this machinery. I was engaged in the construction of part of it; [168] if I remember right, I was at work on the east end. If I remember correctly, I was employed on the extension from that table, this carrying-table B, out east. I would judge that extension to be 125 or 130 feet long. It is the same thing as is there now. The original plans of the work contemplated this lengthened carrying-table. This original plan contemplated that the lumber should be taken along

(Testimony of A. W. Diller.)

the north side of the table as it came out on these chains to be drawn off and placed on carts.

Q. You mean at the time that the accident occurred, but I mean afterwards, where was the lumber loaded, taken off and loaded on the cars?

A. It is loaded from these chains that extend east.

Q. That long carrying-table?

A. At present here.

At the time the accident occurred the lumber was loaded here on this platform called F. I do not remember the exact number of men that were used in working on this platform before these changes were made, four or five though, but I do not remember. These men saw to releasing any jams of lumber that occurred as it came from the trimmer.

If I remember correctly, I made this model about two years ago. When I made the model this plank was not parallel to the dog-roller in the mill; I put this in the model because it was there at the time the accident occurred. I tore out that plank, or else the men working with me tore it out, I do not remember. Mr. Evenson ordered us to take it out,—I think it was the Monday morning perhaps after the accident. [169]

Cross-examination.

(By Mr. WRIGHT.)

I took some measurements at the time I constructed this model of the push-table and carrying-table, of the different distances. It is practically on a scale of one inch to the foot, I think, as nearly as I could make it, but I do not remember whether it all

(Testimony of A. W. Diller.)

scaled to one foot to the inch.

The guard-board in front of the dog-roller was not there at the time I made this model. However, I was familiar with its position at the time of the accident. It is perhaps an inch lower on the model than the position it occupied then.

Mr. WRIGHT.—I have designated this as the guard-board; I do not know whether that is the proper name for it or not. He said it was there at the time of the accident, but it was taken away, and that it is probably represented an inch lower in the model than it was at the time of the accident.

(Witness continuing:) The exact measurements of this model, of the distance from the edge of the roll nearest the edge of the carrying-table, to the edge of the carrying-table would represent about a foot, I think. The distance from the edge of the carrying-table to the guard-board on a direct line is two feet. The height of the edge of the guard-board above the carrying-table would measure about [170] 21 inches. The guard-board was nearly an inch higher; that would make it 22 inches. I think it was a little above the center of the roll. The diameter of the roll, I believe, is 6 inches. The edge of the guard-board was three inches lower than the top of the roll.

The spikes varied from $3/8$ to $3/4$ of an inch.

Measured from the edge of the guard-board or the edge of the carrying-table to the extreme edge of the push-table it is almost three feet. It is about three feet from the edge of the carrying-table to a point

(Testimony of A. W. Diller.)

immediately over the roller on the edge of the push-table.

I was at work in and about the mill after the accident I expect a year.

This diagram was not made after the changes had taken place. The model was made before that was moved out. I do not remember whether it was made before the push-table was lowered. I helped to lower the push-table.

There was an intervening platform between the main platform marked F on this model and the carrying-table, marked B. I think that platform was there at the time of the accident. I thought you had reference to the platform between the carrying-table and the push-table. I think there was a slight step on the platform marked F. It was used to make it more convenient to get up that way. If I remember correctly, it was there at the time of the accident.

Redirect Examination.

(By Mr. HAINES.)

This platform between the carrying-table and the push-table [171] is as it is now and there was a small step leading from F up on to that, which was for the purpose of facilitating getting up on to it.

Cross-examination.

(By Mr. WRIGHT.)

I worked for the Benson Lumber Company at the sawmill subsequent to the accident for more than a year. I have worked for them recently. I quit be-

(Testimony of A. W. Diller.)

cause I got through with the work they had for me. Yes, I guess I was discharged.

Mr. Wright makes his opening statement to the jury. [172]

Testimony of T. C. Kilty [for Defendant].

T. C. KILTY, called, sworn and examined on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. WRIGHT.)

My name is T. C. Kilty. I live at 3760 Olive Street, in this city. I have been here for nearly ten years. I was away about the beginning of this trial, in the northern part of the State, about 100 miles north of Sacramento. I own property there, and came from there down here.

During July, 1907, I was outside foreman for the Benson Lumber Company. I am acquainted, and was at that time, acquainted with the plaintiff in this case, H. C. McCann. I was with the company there before they started, and I think they started in May; the first run lasted until about the middle of June, and then we started up again, soon after the 4th of July, I guess perhaps the next day.

There is always an inside foreman for all mills, and I was general foreman for the Benson Lumber Company at that time and as such foreman I had charge of the men working outside of the mill, and working about the carrying-table and push-table and rolling platform. I employed the men who were thus engaged. I employed Mr. McCann, the plain-

(Testimony of T. C. Kilty.)

tiff in this case. I assigned his duties to him and told him where to work and what work to do. He was one of four men to take the lumber as it came from the mill and delivered on the carrying-table there, as it has been named, to load it on the trucks. I told him that was what he was to do. Three other men were employed with him; Mr. Coffin, and a man named Smith, and a Greek that I cannot just name. [173] I was with these men where they were working a considerable portion of the time. McCann had been at work on that loading platform from, I think July 5th; he had been at work there in the neighborhood of two weeks. He did not have any implements to put the lumber on the trucks with; all that is required is the hands. He received the lumber on the carrying-table there to put it on the trucks. I call it the receiving-table; that is where he took the lumber off and put it on these buggies. He did not have to reach for the lumber that was required to go on the trucks; he only had to reach for short pieces that might get on the table one way or another at the back end; he did not have to reach for any lumber to put on the trucks. We provided him with a picaroon to reach those short pieces. I think I instructed him in the use of the picaroon; think I showed him; brought it up there after the mill had run a day or two perhaps,—I discovered that it was necessary, that it was one of the things we must have, and I had one made and brought up there; they knew, of course, the use it would be put to. I saw them using it; I used it myself, used it for them.

(Testimony of T. C. Kilty.)

There were four men working on that loading platform; they should have worked in pairs to do effective work. I think Mr. McCann worked with Mr. Coffin,—in fact, all of the time he worked there on what we call the outside car, that is the one that is farthest away from the push-table. The four of them had to stand in that space right there; two tended the inside truck and two the outside truck; usually, and at all times, all of the lumber might be over one truck, and they would have to take it, just all worked together. [174]

Coffin and McCann generally worked in pairs. With regard to working next to or farthest from the push-table, they had to work to the best advantage. I think they did that; they arranged that themselves. The lumber came down there; it might all belong on one truck and they would have to do the best they could to get it out. When I first employed McCann I assigned him to this particular work. I think he asked for that job. When the mill had the first run, he was doing the same work, only instead of that he picked it off of the platform; it came down on the platform. I rather think I gave him about a week's work after the mill shut down, and during the time it was shut down he was there and he asked if he could have his job back again; I am quite sure he asked that question. He applied to me for the job.

I have seen Mr. McCann here in the courtroom, upon the witness-stand. As to his size now as compared with his size then, I think he is pretty much

(Testimony of T. C. Kilty.)

the same. I cannot see any difference. I would not notice any difference in his size. I did not know his age at that time. I did not ask him how old he was and he did not tell me. I noticed he was able to do the work. I observed him at the first job he done there, when I took charge of the outside, that he was well able to do the work, as well as the other men. He did not have to make any representations to me about his ability to work, he showed that he was able to do his part of the work at the first run. He was equally active with the other men that were employed at the same place; he was very smart. [175] He had no recommendations when he came to me for the job; we did not require any recommendations; he never told me that he had worked elsewhere for I never asked him. I do not know as it occurred to me what his weight was at that time; he was an ordinary young man; I would judge him to be about 140 pounds; I had no occasion to think about it at that time; I only knew he was able to do the work. I did not form any judgment as to his age at that time.

I have been around lumber all my life; I began work in the lumber business when I was 15 years old, and I have worked around sawmills ever since, you might say, until I came to California, and I worked here nearly two years; I worked here for nearly a year after this accident, as foreman until I got my leg broken down there and I gave up the position. I worked there since; I had charge of the platform. I am not now employed in any capacity

(Testimony of T. C. Kilty.)

by the Benson Lumber Company; have not been for over a year, and am not interested in it in any way whatever. I went back after my leg was broken but had to quit. Mr. Evenson was manager and sent me back to my position, but I found I could not do the work, as my position required walking constantly and my leg swelled up, my left leg, so I had to give it up, then, soon after that, I went back and took charge of the platform, then the shipping. I do not refer to this loading platform; it was the main platform where they load cars; I attended to the loading of all of the lumber that went out on cars.

There have been some changes made in the mill since I was there.

Q. What changes have been made since the accident?

A. Everything is the same except where the double [176] skids appear there, there was only one skid; I think it was made that way though originally, and we only wanted one skid, just a single skid; there was just a single skid instead of double skids there; we found that was a fault and had them taken out right away.

The testimony which I have heard about the lowering of this push-table is correct; I imagine it was lowered about 12 or 13 inches; the principal reason why these changes were made was that they increased the capacity of the mill about that time; they had to have more room; they saw about one third more lumber now than they used to. The carrying-table has not been changed; all that work was there

(Testimony of T. C. Kilty.)

then when the young man got hurt.

Prior to that accident I had never seen anyone mount the push-table from the carrying-table and over the dog-roller. I never saw the plaintiff in this case go from the carrying-table over the dog-roller up on to the push-table. I gave the plaintiff instructions as to where he was to perform his work and where he was to stay while working.

Q. Just indicate on this model here where you told him to stay.

A. He was—these men had this space, the truck would stop about here and the extreme end of the lumber would stop here, so it would not interfere with their passing in here, so that the lumber would extend over here in this way, so this place was never, —one truck would stand in here as close as we could put it without interfering with the running of the truck when it was loaded, and the other would stand on this side of the platform, and I discovered soon after the [177] mill started the way to prevent these jams you have heard so much about was to keep this table clear, if this table was not just clear, it would throw back, and it would keep on until it would touch up here, so that was one of the reasons why these jams occurred which you have heard tell about, by not having this table clear, and quite frequently, in fact every time I would come up there the first few days, I would find this young man here (Mr. McCann) up on this table. I called him down immediately, told him this little platform at the side of the push-table was his place. That was my duty,

(Testimony of T. C. Kilty.)

because I had to have this platform clear in order to keep the mill running, and as I said I discovered this was the cause, or the principal cause, of these jams, not having this platform clear. The boards that came down over the skids were all lengths, many of them were long boards. Sometimes a board passing down these skids and over on to the push-table and carrying-table would be of sufficient length that one end was on the carrying-table when another portion of it was on the push-table; the length capacity was thirty-two feet of the whole thing. The lumber and boards were of various lengths. You know the trimmer might have to cut a piece out of the center; he might have to trim the wane,—the wane is bark that comes in the lumber, in the log,—so he might have to take a chunk right out of the center of say two feet in order to make this lumber merchantable lumber, make it into what we call merchantable lumber, and of course a big piece would fall on here, and the other piece on here, and these skids extend here the same as there. At first, I told McCann a couple of times a day, maybe more than that, to come down here on the platform by the push-table and stay here. I presume that [178] I told him oftener than that. He seemd to be up there on the carrying-table every time, when I would come up at this particular place he would be up on this platform, and there would be a jam there, because it required the men to work in pairs in order to do effective work, they could not do it otherwise. I never saw any of the workmen whose duty it was to remove the lum-

(Testimony of T. C. Kilty.)

ber from the carrying-table and load it on to these trucks mount the push-table over the roller. They could not possibly be expected to do a thing like that; this lumber was coming down here, and there was no reason for any man to do that; there was no plan of work that called for that kind of a movement.

I did not superintend the construction of the push-table and the carrying-table. I was not a millwright there; I only placed it in use. I know the guard-board marked "X" on the model is a section there; it is just a common section of what we call a live roll.

I never at any time, during the employment of Mr. McCann ordered him or directed him to mount the push-table. I never ordered any of those men—I did not have to order them, because they learned very early there it was their duty to take that lumber.

The workmen generally mounted the platform by two trucks on the inside. The only time a truck was not there was [179] in the process of moving a loaded truck and replacing it with an empty truck. There generally were two trucks, one on the inside. We replace them both at the same time; they came in for loading; the loading crew generally done this replacing.

I had general supervision over the loading of these trucks as well as the work at the carrying-table. The height to which they were generally loaded depended on how fast the lumber came, and if we had cars to load them into quickly, and a great many

(Testimony of T. C. Kilty.)

things, they would go from two feet to three feet high; that is, from 1,500 to 2,000 feet on a truck, 1,500 feet would be an ordinary load. The height would not make them fall off; it was the faulty loading that would make them fall off. The height would not cut any figure; you can load it as high as you please and not have it slide. We had two trucks there; the first trucks we used, I am not quite sure if we had any of the new trucks there at that time or not; they had about 40 inches of loading space, I think.

I have gone on top of this push-table. I got up on the lumber and got up from behind sometimes, but most of the time I got up on the cars, also on the buggies, to get on top of this push-table. Mr. McCann got upon the lumber to get up there; he could not get up any other way, only on this lumber buggy. I think Mr. Coffin had been working there from the very start—I would not be sure about it. I kind of think he was right there from the start. I know there was not any platform there; that post was not there; those posts were not there. All this portion of the machinery was outside of the main building. The trimmer was inside. The push-table and carrying-table and loading platform were just outside the wall of the [180] mill. The carrying-table and push-table and platform had only been constructed and in use about two weeks. We put a shade over that very soon; I would not say it was there then, but I decided they had to have some shade there, but I would not say how many days—I would

(Testimony of T. C. Kilty.)

not say yes or no to the question as to whether there was any cover or shade over that at that time; we put it there afterwards, after the mill started, I know that. The boxing of the shaft which revolved the rollers on the outside had guards on. I did not notice particularly whether there was a big plank that extended also as a guard on the outside of the roller—there is so much machinery; but I rather think it was covered, though.

The board shown in the photograph attached to plaintiff's deposition extending the entire length of the push-table just outside of the casing is part of the frame. It extended far enough above the rollers to prevent the lumber from throwing over. That shaft there shows the boxing; it shows the shaft there, and each one of these is the boxing that runs the live rollers. The boxing is protected from accident, and there is a bevel here on each set of rollers there, and each one of those is a bevel gear, each one here has a large gear, perhaps about six inches that runs these live rollers; these rollers are continually going, as these gentlemen saw them when they were down there; these are covered with a casing, and this roller might have been covered. It might have been covered sidewise. I would not have taken any particular notice of it. [181]

I have been employed in and about sawmills since I was fifteen years old, and am familiar with the construction and operation of sawmills generally. I ran one for four years myself. It is customary to have push-tables and carrying-tables and loading

(Testimony of T. C. Kilty.)

platforms such as constructed here, in sawmills. The handling of lumber in the Benson sawmills is one of various plans, like any other; it depends upon where the lumber wants to be delivered. The push-table and the carrying-table at the Benson sawmill are constructed as push-tables and carrying-tables usually are constructed. The push-table is just that there. That cannot be constructed any other way. That is always the way of a push-table. It would not be a push-table if it were constructed in any other way; that is what it means; that is what it is; it is the change of the course of the lumber, that is what a push-table is. There would not be any way of covering up or protecting that dog-roller or spike-roller so that a person could safely go up from the carrying-table on to the push-table. If you did cover it up or protect it, the lumber would not strike it at all. The lumber could not strike the spike-roller, and the spike-roller is put there to prevent the lumber from sliding back when it tips. It was there, so that when it tipped and struck the other table, that it would not slide back. That is what a push-table was, to take it until it was clear of the roller. The guard-board which is indicated by the letter X on the model—that is, that board which extended about half-way up to the roller and between the board and the roller where the boy got his foot caught, broke first in the center and hung there in two pieces for quite awhile, and then it was pulled [182] off. I don't know who pulled it off, I wouldn't wonder if one of those men pulled it off

(Testimony of T. C. Kilty.)

that was there. It might be a couple of weeks or three weeks after this accident that it broke. I don't remember the exact time. It broke from the lumber falling on it and wore out and broke the board. I remember quite well it broke in the center and hung in two pieces, hung at each end for quite a while. There were not any boards placed back on it after that; that is, not while I was there. I stayed more than a year after this accident happened. The accident happened in July, and I had my leg broke the following December, and I worked there until,—after I got better, I worked there until the following November or December. That would be a year afterwards.

I have seen Mr. McCann, the plaintiff in this case, on top of the push-table. He got up on the lumber wagon to get up there. He got up there to release a board that was wrong there, or fouled in some way. It got fouled on the push-table. The usual and customary way of getting on that push-table, if it became necessary to get up there, was to get up on the lumber, on those buggies. They sometimes get rid of a board from the hind end here; there was a step there that was used sometimes in the early part of the—so you could touch a board and all you had to do was to shake it up and it would start off, and sometimes a board would get under the board that was to go, a chip or inch piece and stop it there from resting on the rollers. I couldn't say that I ever did see the trimmer stopped to clear away a jam on the push-table. It would be a good thing to

(Testimony of T. C. Kilty.)

do it. I couldn't say I did see it stop for the purpose of clearing the push-table. I testified [183] I never ordered Mr. McCann to get up there, but on several occasions I told him to get down off the carrying-table and keep in his place, which was on the platform. The reason I didn't tell him not to mount the push-table from the carrying-table was I didn't think—the roller was there right in plain sight, in broad daylight, and pretty good notice I thought for a man to keep away from it, and that fact for him to stay in his place was all I wanted, to stay in his place and do his work. I employed the other men engaged in and about the loading platform. They had not all been to work there about the same length of time. There was some changes made there. I couldn't say that all of the four or five men who were at work upon the loading platform were employed about the same length of time. Mr. Coffin was there, I know, all the time, and I think there were some changes made there. Those same men had not necessarily all been employed on this portion of the mill, which had been operating for about two weeks. I don't think this man,—I can't call his name,—I don't think he was there all the time. I know Mr. Coffin was there all the time and Mr. McCann was there all the time. Mr. Coffin was one of the original men.

This push-table became clogged or jammed up with lumber, you might say like an accident occurred; you couldn't tell when it was going to happen, and it might run a whole day and not run half

(Testimony of T. C. Kilty.)

a day. It might occur two or three times in half a day. It was just simply a kind of a mismove of some of the lumber. It was not on every occasion that there was a jam there that it become necessary to get upon that push-table and relieve the jam; if you gave that a pull or [184] a push you might start it off. Frequently that was all that was necessary to move it. The end of it might be against something and the other end under a board and throw that end out and change the course. In the performance of my duties I was in and about the yards of the mill and in where this platform was and around the carrying-table many times in the day, my duty was general oversight over the work, and to keep the mill clear and keep the lumber when it was piled, to see that it was loaded in the cars.

In performing the work about the loading platform McCann did all right; he was as good as any of the men and did his equal portion of the work. He was not as large a man as Mr. Coffin, but it did not require strength only but activity and to take hold of one end of the board and run ahead with it. He never complained that the work was too heavy for him. I had no favorites and there was no favoritism shown as to light work and he was not given any preference over any body else. I favored him some as a man in the pond wanted a man, and I sent him down to the man in the pond, as I thought he could do the work down there. It was a much better place for a young man and I thought this young man, being active, might learn to ride logs, and I

(Testimony of T. C. Kilty.)

sent him down there, that requires a man who can ride a log in the water; there are not very many of those men here. I put him down there as I thought the job would suit him; a man is better fitted in some places than others, but the man down on the lake wanted a man who could do the work right then; he didn't want a man who had to learn, so he sent him back.

I gave Mr. McCann the same instructions about his work [185] that I gave the other men; there were four men and they all had the same instructions; in fact, they knew their work and knew it like a book, and as far as I know it was the custom of all the men to get up on that push-table from these carts, and go around the end where I saw him get up. I never saw anyone connected with the work there mount over the roller from the carrying-table upon the push-table.

Cross-examination.

(By Mr. HAINES.)

I don't think I saw a man get up that way any time; if the mill was not running, the chances are I would not be there, and if the mill was not running they generally sat down. There would be no occasion for him to get up there when it was not running, unless it would be to clear away little pieces. The only occasion there was for getting on that push-table was when the mill was running.

I don't believe there is anybody that could tell about how many times during that two weeks that the machine was set up that the men had occasion

(Testimony of T. C. Kilty.)

to get up on the push-table. I didn't keep track of it. It would be a good many times.

I saw Mr. Coffin, and the young man upon that push-table and was up there myself. Also saw the scaler up there sometimes, the man that scaled the lumber, that tallied it; he would happen to come along there from some car and would punch it out. It wasn't anybody's regular business to get up there. When the thing was built it wasn't intended that anybody should get up there. The men did go up frequently as they found they had to because the lumber would go wrong, something would happen that would cause it to stop, and if they didn't get up there and [186] release these jams the lumber would eventually pile up so it would have to be taken off and loosened. Certainly, they had to remove those jams; I don't say they did not have to get up on that platform. I haven't said that; it was necessary to go up there on the push-table. I did not see them every time it was necessary to get up there; I was not there all of the time. It was the place of these four men to look after these jams. If that jam occurred or trouble occurred on the carrying-table, it wasn't anybody's duty to see to that; these four men had to take care of all the lumber that come down there to see that it was put on those trucks. They had this picaroon to work with to reach over if necessary. I should say the first one I made there was about four feet long. I believe Mr. McCann made one for himself, but I could not say whether he made it longer than the rest.

(Testimony of T. C. Kilty.)

The general location of one of these two-wheeled lumber carts was in next to the push-table, then a little space, then another one to the right of the push-table, looking north. I think the cart would track about three feet.

A man with a picaroon four feet long could not stand on the aisle between the two carts and reach over and do anything on this push-table; he could stand on the platform. He could not stand on this platform between these two carts and any lumber piled on and reach over and release any jam with his picaroon; he couldn't use the picaroon to release any jam; it was too high for that purpose; he would have to get up on something. I always thought it was about five feet. I was going to remark, it was about the height of my shoulder. I never had any occasion to measure it. I understood you had [187] the measurements here.

Q. Yes, we have it; five feet seven?

A. I never measured it, but I frequently stood there as I was going to remark, and leaned my shoulder against this roller, is what I said.

Q. Against that roller here. A. Yes.

Q. You would lean it against the roller?

A. Just about that height.

Q. Did you ever lean against that roller while it was revolving?

A. No, I am not as foolish as that.

Q. Now, then, if one of these four men was getting upon this push-table, he would have to go up over this revolving shaft, wouldn't he?

(Testimony of T. C. Kilty.)

A. He would have to go to get up there, I am not quite sure whether that shaft is covered or not, I am not certain about that.

Q. That shaft was there? A. Yes, sir.

Q. You saw it the other day, didn't you?

A. Yes, sir; it was there all right.

Q. And isn't it true that the shaft itself, on substantially or altogether its whole width is exposed now? A. Yes.

Q. Was it any different then?

A. I don't think it was. I think it is just the same as it was then.

Q. You would think it was dangerous to lean against or have your clothing come in contact with the revolving shaft?

A. You couldn't lean against it, but if a man was standing on the load of lumber on one of the carts, he could reach in and reach any part of the platform, if the cart was just right.

Q. And would not tilt with him? This was a sort of a tilting cart?

A. Yes, two-wheeled cart. It was loaded so the heavy part would be in front; it was always leaning down in front. We tried to keep it so we could tip it back easily, pretty near balanced, but the balance a little way from the front. I think they provided for a man getting on the back part of the cart, or it would tip down. I think we had a horse at both ends. I think we had something to keep it from tipping down, at least in front. [188]

I think this platform was about ten or twelve feet.

(Testimony of T. C. Kilty.)

I wouldn't say it wasn't ten feet; I would not dispute your word. These men had to do all the work of loading this lumber upon these carts, and it was their duty to see that the lumber was not jammed on the push-table, or the carrying-table. I saw the young man on the carrying-table at one time, and asked him to get down so he could clear the table,—keep that table clear. He was doing nothing there. I wanted him to get down and hustle up the work, get the tables clear. That was all that was necessary, to keep that lumber off the table; and that is all I said to him, to get down and get the lumber on the cars, and hustle this work. This platform which is here shown between the push-table and the carrying-table was never there, that I know of. I heard Mr. Dillard's testimony. I don't say that he is wrong. I don't say anything of the kind. This could not have been there. It was not there. There was a step clear across the whole platform there. They wanted to get it just to the right height. There is a step about 4 inches high from the lower platform. There was a lower platform; I should judge about 4 inches, I think it was about; it might be two planks, one plank on top of the other. From the loading-table up to this carrying-table was about three feet. They would put those planks there to adjust the lumber, so the lumber comes so they would have the full strength of their arm to pull it out, to get the right height, and I think they found out it was a little bit too low, and so they put on those two pieces to bring it just right and

(Testimony of T. C. Kilty.)

get hold of a piece of lumber and pick it up. This lengthened carrying-table was built at the same time, and it was not in use yet; we hadn't any use for it; you could put it either way. [189] I don't say that it was put there without intending to use it; it was put there to be used when the time came to put the lumber out in the yard. This carrying-table was a part of the original plan of the machinery, and when we got through filling the contract we had no use for that platform. That platform conformed to the main platform leading to the cars, and all the lumber at that time went on to the cars to the Russ Lumber & Mill Company; they took the entire output. It was built to load the lumber into the cars, and all of the lumber at that time went to the Russ Lumber and Mill Company and was loaded directly into the cars. We had not yet used the yards at all. The platform for the yards is also about three feet lower down than that platform. Ever since the Russ Lumber Company bill was filled that has been put into operation and has been used to the exclusion of this platform. It was a rather confined and congested place to handle all this lumber and at the same time to have the men keep watch of the push and carrying-table, but it answered the purpose.

There was considerable noise going on when the mill was in operation; you can't run a mill without a noise,—it is a necessary thing; there is a band-saw, trimming-saws and edging-saws, and the clatter of lumber all going on at the same time; the whole thing

(Testimony of T. C. Kilty.)

goes together in order to have it go at all.

The machinery in this mill was all new about the time this accident occurred; it had been there just about two weeks. It was no experiment; it had come from a plan; I think it was an Allison mill. It was an Allison mill and they don't ever experiment. The push-table and carrying-table features and the long carrying-table were preserved as features of the [190] first prepared plan. Those are the features of the plan that are permanent. I do not know what the man had in mind in moving this push-table out three feet. I know what I would move it out for. It was lowered in order to move it out so as to get more space inside.

Q. Then it was not in perfect working order at the time this accident occurred, was it?

A. Yes, sir; you don't mean to say that things don't improve? Things improve right along.

These skids were of wood, 2 by 6, and were not shod with iron at the time this accident occurred, and all sorts of lumber came down on them; some heavy lumber; all kinds of lumber—everything that comes from the mill. Naturally it very soon gouged out the surface of these skids and broke off the ends. It will wear. Looking at the photograph, those skids show wear. The irons were put on there to preserve them.

Q. That was all done after the accident?

A. The mill was more along and running, and naturally after it has run awhile you see where it would wear, would not want to have to put in those

(Testimony of T. C. Kilty.)

skids every week or month. Those are double skids; we had them taken out and made single skids. I don't think any of them were broken out during the operation of the mill; they would not hardly wear out in two weeks.

Q. Everybody about the mill was unfamiliar with the operation of this machinery during that two weeks more or less, were they not?

A. Unfamiliar with the sawmill?

Q. No, with the operation of these push-tables and the carrying-table?

A. They were new there. [191] The push-table was removed eastward some three feet and lowered a foot; in lowering it that increased the capacity of the mill and they wanted more space for the lumber to come before it would strike the table, so one piece would get out of the way of the other. They increased the capacity of the mill about the time they made the change there. I do not know when that was. The mill commenced running in the first place in May of that year, I think. It was in May, whatever the year was. Before this push-table was put in the boy was employed there, and at that time the lumber was delivered from the trimmer down on to this same platform, and he worked there. The mill shut down for about two weeks.

Q. And put in the mill while the boy's labor was suspended, wasn't it?

A. Not during all the time; I think during the last week.

Q. And during that time the new machinery was

(Testimony of T. C. Kilty.)

put in? A. Yes, sir.

Q. And he went to work with these among the machinery?

A. Yes, sir.

I didn't see why there was any danger to any employee from this dog-roller; it was visible to them as to myself; it was stationary, and worked at the rate of about 150 revolutions a minute.

The plank X had no connection with the pushing of the lumber. It had no utility whatever in handling the lumber.

I was not there when this accident occurred; I was somewhere out in the yard,—I suppose, around the works; I came there just as they were carrying him to the blacksmith-shop, or into the office. I didn't see any indications of where the accident [192] occurred by looking at the dog-roller and the plank in front of it, for I didn't examine it. This plank remained there for some time afterwards, until it was broken out accidentally. It was broken before. It was only broken once, and then after it was broken it was taken out.

I could not hear Mr. Dillard's testimony; I am just giving my testimony. I am sure that that remained there until it was broken out by the operation of the mill; we had no purpose in taking it out whatever; it was broken out, that I know positively. It was broken in two parts, and hung right down like that. It was not broken any time during the two weeks I was first employed there, that I know of. It was not put back because we had no use for it.

(Testimony of T. C. Kilty.)

When I employed this boy I did not take him and point out the possible dangers of this machinery; I showed him his place and started him, instructed him what to do, the same as all the rest of the men. I never said anything about the jams at all to any of those men about that push-table. They knew their job was to release those jams, if there was any. Every man around the place knows their job. The boy knew that, too. I did not instruct him at all as to how he ought to go up on the push-table; I just told him where his place was to work, that is what I told him. I didn't tell him that I expected him to work at releasing these jams when it occurred; I didn't happen to tell him that duty; I didn't tell that to any man there. They knew it was part of their job; they were there to take all the lumber that came from the mill; they were to take it off of the platform and it was their work to see it came on the platform. They knew that; I didn't have to [193] tell them that particular thing that way. They knew if it was necessary to do so in their judgment they must get up on to the push-table; they knew their job and they knew they had to take all the lumber that came from the mill. I didn't tell them how to get up on the push-table; I didn't speak about the push-table at all; I never had to give them that particular instruction; I gave them no instructions about the push-table. I would think I was insulting a man to tell him to watch out for this revolving shaft if they got up over it; you didn't have to tell them that.

(Testimony of T. C. Kilty.)

Q. In other words, you expected the boy to have the judgment of a man?

A. He was one of the men, he was not a boy. In my judgment he was as good as any of those four men there. I didn't know how old he was; I know since. When I put him to work all the instructions I gave was to see that the lumber was loaded from that platform on to the trucks.

I saw some of the men up here releasing jams. I believe I saw McCann up there; I could not say how often; it may have been once.

Q. Do you know how he got up there, when you saw him?

A. If I saw him up on the table, perhaps I would know how he got up there. If I saw him in the act of getting up, I suppose I would not. I think I did see him once in the act of getting up on the push-cars.

I don't know how many times I saw him; we didn't count those things because we didn't expect we would be called on to answer these questions.

It depends on what you call frequent as to the attention [194] required in releasing these jams; it might be once in the forenoon, and it might be twice; it might be more and it might not be any at all. This was irregularly the case during those two weeks that he worked with this push-table.

Mr. Evenson was the general manager; he had an office there on the ground.

The boy seemed to be ambitious to do his work and I considered him a good, willing worker.

(Testimony of T. C. Kilty.)

Q. Did you notice whether he was up oftener releasing these jams than the other men?

A. He was up on the other table oftener. I wouldn't say about the push-table, but he was up on this receiving-table, or carrying-table.

I don't think that I saw anybody but him and Mr. Coffin up on the push-table. I wouldn't say that I ever saw Smith, and it might be possible that I saw Smith. He was a young man. Mr. Coffin was the principal man, I think, that went up there.

The scaler was scaling lumber and went into the car, right at the car. He was waiting for the car to be loaded, and if he got through he would be up there before they were finished, and he would be there, and his car there, and frequently I would have to call his crew to clear the table. It was not any part of his job to take care of the push-table. It was very often, though, that he would be called to clear the table away, to clear away this jam, to help clean off this table, the receiving-table, so he would be there on an occasion of that kind. The work was not so heavy that it got ahead of these four men sometimes; it was because there was a jam there and it would have to be cleared off to keep it running smoothly. [195] I do not recollect any instance or reason why it should stop the mill, nothing so serious as that. A jam is just a glut of lumber; it is just a pile of lumber that got away from them; they couldn't handle it as fast as it came out while they were changing cars; it was not a jam, but a glut; the glut always occurred on the carrying-

(Testimony of T. C. Kilty.)

table; there was never any glut on the other table; there could not be there, because if it did not push off immediately it was because it was stuck and that particular piece has got to be moved. If a particular piece of lumber stuck up there and you would leave it there, it would certainly interfere with the operation of the push-table, and would have to be attended to right away, and a man with a picaroon such as I have described could not reach over between these tables up toward the upper end, the north end of the push-table. I guess there seemed to have been a choice here how to get up, whether to get up on to this push-table over the cart or some other way; that is one way you could do it.

Redirect Examination.

(By Mr. WRIGHT.)

It was possible to mount on the top of those lumber buggies and reach from the top of them with a picaroon on to the push-table. If you could lift yourself so you could see over there or reach the thing, a man would have no power with his picaroon reaching over in that way, on a level; he would not have to go more than two feet to control things up there.

There were no set-screws or anything in that revolving shaft by which one could get his clothes caught; it was smooth between each gear; each beveled gear and the gears were all protected, and there was nothing on this revolving shaft that [196] could catch a man's clothes and wind him about but

(Testimony of T. C. Kilty.)

the short shaft, and that was perfectly smooth. At the time of this accident on July 30th, 1907, the loading platform extended clear out to the railroad.

Q. Then it has been sawed off or shortened?

A. There has been a roadway cut through there.

Q. And at that time the carts were loaded and pushed clear out to the railroad track. How far is that?

A. Perhaps a hundred feet. That is a hundred feet from where it was loaded out to the railroad track, and at that time everything was delivered to the Russ Lumber Company above culls. We were not storing any lumber in the yard, and for that reason we were not using the carrying-table to project it on out.

Q. I believe you said these changes were made on account of the increased capacity of the mill?

A. That is what I should say they were made for, that is, the changes were made while I was away from there. I think I heard testimony that the changes were made two or three years ago. They were not made within two years after the accident. This is an Allison mill; they are one of oldest sawmills in the country, and this push-table and carrying-table is part of the general plan of the Allison mill, and that would be the general plan for it if the lumber had to be delivered out straight ahead, that would be different, but that is the Allison plan.

Speaking now of this accident, about that time I think they all got the same wages, \$2.50 a day. I don't think Mr. Coffin got any more then, but it was

(Testimony of T. C. Kilty.)

afterwards. He was the [197] leader of those four men.

A jam or a glut of lumber occurred only on the carrying-table, and whenever a piece caught in the push-table I don't refer to that as a jam or glut.

We had two sizes of truck; I am not sure whether we used any of the new trucks in loading lumber; we had two sizes; the first truck we used there I think they tracked about three feet, and they would extend a foot on each side, that would make them about, the extreme width, about maybe four feet. The trucks we had were those low trucks, and I ain't quite sure whether we had our new trucks in at that time or not; would not testify as to that. I was only speaking of the old trucks.

Q. For the purpose of refreshing your memory, I will hand the witness an invoice. For the purpose of refreshing your memory I hand you an invoice of twenty-five special lumber buggies, bought June 14th, 1907, paid June 25th, 1907, and ask you if those are the extra trucks you got about that time.

A. Yes, those were the trucks we got. We were using both kinds; yes. I think we were using both the smaller and the new trucks at the time of the accident on the platform; I would not say that we were not using both kinds. The smaller truck which we had before we bought the new invoice had iron wheels. There was a first frame of perhaps four by eight extending up above those iron wheels. Just the axles were placed under those pieces and then on top of those cross ways were four by fours. The

(Testimony of T. C. Kilty.)

top or level of the cart was elevated about six inches above the wheels. [198]

Q. What did you say was the height of those carts, these cross-pieces from the platform, without any lumber on them at all, I mean now?

A. I would say the wheels, I think the wheels were about, if that would make them twelve inches center, and then if the sides were four by eight, that would be eight inches on top of the center.

The surface of the cart, without any lumber on it, even the low carts, was about two feet and a half. The wheel was say two feet and the cross-pieces was about on so as to clear the wheel and that was a four by four, that would be two feet and a half about. The height we generally loaded those cars of lumber would vary. We come along there, and if the loading-crew was ready to take it, if they saw a chance to remove the load, they would take it. If it was perhaps two feet above that, two feet of lumber on it. When those two carts were both upon the platform, there always was a space left between the two sufficient for a man to pass easily in and out, and notwithstanding the platform was somewhat congested, that space was always there, it had to be there; you couldn't do business without it. It was necessary for men to get in and out between the cars on the platform.

At the time of the accident we were delivering all of the sawed lumber, except the culls to the Russ Lumber and Mill Company; they had a contract for all the entire cut up to a certain time or period of

(Testimony of T. C. Kilty.)

that year; they took all the cuts; the entire mill run went to the Russ Lumber Company that year. They kept ordering certain lengths and widths, but not at first until later in the season, when they began to see that we could get out those special things.
[199]

Recross-examination.

(By Mr. HAINES.)

I would say that the height of these loads of lumber and these trucks varied; we will take from a thousand to fifteen hundred feet on a truck. You could take fifteen hundred to two thousand feet on the big trucks, you could put two thousand on them, and the chances are there were lots of loads were put out there with two thousand. It would depend on the length how high the car would be; you might have two thousand on there and not be as much as a thousand of the other lumber. Perhaps three feet is the highest I have known of those having been loaded. If it was three feet high, then the top of that load would be five feet six inches from the floor. I have seen lots of loads of lumber, a man pushing, he would push away up high; he would not have to bend down to push on that load of lumber. I never measured them.

Q. If a cart was as highly loaded as that it would be hard to get over it to get on the push-table?

A. That would be about as high as the push-table; that would only happen maybe once in a while. I am not saying that happened very often, or happened at all, but I never measured the loads, but that

(Testimony of T. C. Kilty.)

car carried some one to two thousand feet of lumber, that is what we done.

I never said anything about that I ever instructed my employees to climb up over those carts to get on to the push-tables. I said I never gave them any instructions about that climbing at all.

Redirect Examination.

(By Mr. WRIGHT.)

There were no arms or cross-pieces of the frame that [200] extended out beyond the wheel beyond the load of lumber several inches upon these lower or smaller carts; we only had a few of the small carts and they extended out over the frame; the lumber would go nearly to the outside.

Q. Isn't it a fact there was always left a place where a man could put his foot to step up on?

A. That would depend on the bed of the load of lumber. Sometimes you couldn't put a 10-inch board there, but would put a 4-inch board, so in making the bed, as you call it, that would depend on the width that would be left outside, it might be three or four inches and might be more.

Recross-examination.

(By Mr. HAINES.)

I think these larger trucks were about 42 inches wide where the lumber was piled, where we load the lumber, from outside to outside. The track of those few trucks was about an ordinary wagon track. I never measured them. We couldn't use two of those big trucks at one time on the platform. We

(Testimony of T. C. Kilty.)

used one. I am not very certain whether those were used at all at that time; I would not be positive as to that. We got the trucks in June. The first consignment was *no* small trucks, the small trucks were made right there. Those big ones were all the same, and we were using them, that is a sure thing, because we were anxious to use them; they rolled so much easier; we liked to use them, but we couldn't use two of them side by side on that platform. [201]

Testimony of Benjamin C. Coffin [for Defendant].

BENJAMIN C. COFFIN, called, sworn and examined on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. WRIGHT.)

My initials are Benjamin C. Coffin. At the present time I am living in Minnesota, International Falls. It is right on the Canadian line. I work in Port Francis, Canada, and live in the United States. I think I went there three years ago this last—two years ago last June, I think, some time about that time. I have been there about two years. My business there is carpenter work. That is what I work at. I don't know how long I have been a carpenter. I have worked at the business off and on for twenty or thirty years, more or less. I once had the good fortune to live in San Diego. That was the first time I came here; I think it was in 1904, and the next time I believe it was the next year I came back. I was here in 1907. I then worked at various things around town here, and finally I wound up by work-

(Testimony of Benjamin C. Coffin.)

ing for the Benson Lumber Company. I know Mr. McCann, who sits at the end of the table. I have saw the gentleman, the boy. I have worked with him at the Benson Lumber Company. I was there in July, 1907, when Mr. McCann had the misfortune to get hurt. At that time I was working in the capacity of lumber sorter, or something like that,—I don't know what you would call it, taking care of the lumber there; I think I am a little bit familiar with the construction of the Benson sawmill. I recall very distinctly the location of the push-table and the carrying-table. I know what is termed the leading platform.

This is the end we worked at (illustrating from model.) [202] I was at work about there,—the center of the loading platform, lettered F; I should say two or three feet from the carrying-table. I don't know just how far,—far enough to handle the lumber over here. I had the same duties to perform there as the other men. Two of the men besides Mr. McCann here were Greeks, and didn't understand the English language very well, and didn't understand this work very well, so they had to be instructed, and I think one worked with McCann, as I remember it, and one worked with me, but at this time I think McCann and myself were working together, but these two men here had to be—the lumber had to be sorted and you had to put it on a truck here, and one here. When Mr. Kelty was not there, I myself had charge of those men. Mr. Kelty's position was that of yard foreman. When he was absent,

(Testimony of Benjamin C. Coffin.)

the understanding when I was put there to work was that I was to have charge of the men. Mr. Kelty gave me those instructions. I don't know whether the men knew that or not. They surely took my instructions. On the 30th of July when this accident occurred, I think Mr. McCann and I were working together. I am not sure of that, but I am certain I stood about two or three feet from this table when that occurred. I recall the accident on the 30th, in which the plaintiff, Mr. McCann, had his foot caught in the roller. As to where Mr. McCann was standing immediately preceding the accident, I don't know. He was on the lower platform, where we were working,—on the platform F, which we are designating as the loading platform. He was helping to take the lumber off the feeding table there, at that time.

As to what, unusual, attracted my attention at that time, we had been pushed pretty hard with the lumber, that is, [203] it had been coming pretty fast, and all at once I missed it on the receiving-table, and looked up and saw that the carrying-table, this other table here, was loaded with lumber and I hollered, I think, and I know I hollered to the trimmer to stop, but I don't know that he heard me, and McCann saw the lumber at the same time, or when I hollered, and he came around me and went in between there and got on the receiving-table there and went to jump on this table, this here. No time at all was occupied, hardly,—just as quick as you would think about it, almost. I did not order him to go up there. Mr. Kelty was not about at that time. I was in charge,

(Testimony of Benjamin C. Coffin.)

as much so as I was at all the time. It was part of my work. It was part of my work to look over the other men when Mr. Kelty was not there. And as soon as that jam occurred, I called out to the trimmer to stop that. I know that McCann started; he went after I hollered, I know that. I don't know whether he saw it at the same time I did, or how it happened, but I know he went after I hollered. I saw him leap from the carrying-table up over the—I didn't know that he was going to do that when he started out there. I never saw anybody get up that way before. I had been there perhaps for ten days or two weeks. I came a day or two, or two or three days after the new machinery was inaugurated. But from the time I commenced to work; I was there continuously all the time the mill was running. My place was always on the loading platform. I had never seen anybody get up that way. I don't know how his foot happened to get caught. It flashed in my mind, or I saw a piece of plank come down as he jumped, and I thought it struck his foot, and drove it down onto the spike-roller, that is what I thought [204] about it. As to the lumber coming down off the push-table when he jumped, it was miscellaneous. There was a board now and again. This jam had been caused by a 2 by 4 catching on one of the skids. Part of the jam was almost instantly released when he jumped up there. There were two parts of it. One was above the 2 by 4. That did not release, but the other part released and went on. It released itself. I couldn't say exactly where his foot was,

(Testimony of Benjamin C. Coffin.)

but it was between the roller and board marked X on the model, and I should say near the center of the roller. I couldn't say at all as to whether he attempted to alight upon the board marked X on the model, or attempted to clear the roller, and was caught by a board. After his foot was caught, the man that was doing the trimming of the lumber stopped the lumber from coming over. He could do that at any time. I saw the man, I knew he did stop because I hollered, but I hollered the second time. I hollered both before and after the boy caught his foot. Sure there is a good deal of noise made there by the machinery, by the band-saws, and that rumbling and crumbling of lumber. Occasionally we have called the trimmer and made him hear us, and other times he would not hear me, because of this jam, it was liable to occur sometimes once a day, and sometimes maybe less or maybe more.

Before McCann started to get up on the push-table, I had called to the trimmer to stop the lumber. He did not have to stop the mill in order to stop the lumber, because the mill is built in such a way, or was at that time, that he had to handle the lumber, to get it on to the trimmer, where the saw is, and those saws I believe, are four feet apart, I believe, no, they are two feet apart. He could cut a piece of lumber into any [205] length he wanted to. The operator had to put all the lumber from one table on to another one before he could come to the saw. I had never seen any one connected with the mill mount the platform indicated as the push-table, over

(Testimony of Benjamin C. Coffin.)

the roller. I have been up on that push-table myself. I went up generally over the truck. Sometimes there was a pile of lumber upon this part here. I went up over that. We had a ladder there, but it was not always used. I know we had a ladder, but it was not used. The pile of lumber was immediately behind this here delivery-table here. The platform known as the loading platform, and indicated by the letter F, is considerably above the ground. That pile of lumber was piled on the ground, and came clear to the top of the push-table. That was a pile of all kinds of miscellaneous pieces,—short pieces and big timbers and heavy timbers and all kinds of timbers dropped in there. I don't remember having seen McCann up on the push-table,—I might have seen him there. I don't recall it. I don't know that it was anybody's business particularly to get up there and release it. I was naturally the fellow to look at; it was naturally my business to look after it. I have been there quite often myself. Of course, I worked there a long time after McCann did. I continued to get up there. I went up there as I said,—just as I have indicated. That space was always there after this mill was made.

I have often seen McCann up on the carrying-table indicated with the letter B in the model. I never gave him orders to get up there. To me it was quite a dangerous place, and I told him several times that I was afraid he would get hurt there, that is about the way I worded it. I considered it [206] a dangerous place, and so it was considered by all of

(Testimony of Benjamin C. Coffin.)

them. I never told him not to get up there, but that I considered it dangerous; I never ordered him to come down off of the carrying-table; I have seen him up there and told him it was a dangerous place, as quite frequently there were very heavy timbers came down there, say eight by eight,—down those skids, and would shoot down on to that. I told him that was a dangerous place for him to be. He was supposed to know where his place to work was. I had no occasion to tell him not to get up this way. I never saw the boy try to do it before, nor anybody else.

Q. The reason you never told him or warned him against mounting on to the push-table from the carrying-table or by the spike-roller, sometimes called the dog-roller, is because you never saw him try to get up that way, and never saw anybody else try to get up that way?

A. No, sir, I never did, neither before nor afterwards. It was a dangerous place because there is skids all right clear out on beyond to that other table; it is not represented there at all, I do not think. The skids extended the entire length of the push-table and carrying-table, I think, and that timber comes down there very viciously; one of those 8 by 8 or six by six timbers, or anything like that, if it would hit a man, it would break his leg or smash his foot, the way I figured it out. I told McCann: "I am afraid you will get hurt there."

As to why I didn't tell him this was a dangerous place, that is, that mounting the push-table from

(Testimony of Benjamin C. Coffin.)

the carrying-table over this roller, was because I had no idea that anybody would try to get up there. McCann was a very active fellow, very active. He was the same size he is now, as far as I can see. I cannot see any difference. He did a man's work. He did as much [207] or more than the usual man under my control there. He was very active and agile. He hopped about quite lively. As to the instruments provided with which to reach over and get the pieces of lumber on the carrying-table: we had two picaroons, a short-handled one and a long-handled one; I think the short one was say three feet, or something like that, a three-foot handle, and the larger might have been five or six or even eight; it was very long, anyway. We had two of them at that time. I would not say whether McCann had been using the picaroon in the forenoon of the day on which he was hurt or not. I know he was not using a picaroon at the time he was hurt. The lumber buggies, or push-carts, were on the platform at that time. They were putting the lumber on to the push-cart. I think the lumber was about half loaded. I do not think they at that time were in such a condition that if a man tried to get up on them that the lumber would likely tumble off. There was not any necessity of McCann getting up on the carrying-table, lettered B, after I told him it was dangerous, because he could have went up over the cart, or could have went up behind, as I always went. I said that I had told him several times it was dangerous to go up on the carrying-

(Testimony of Benjamin C. Coffin.)

table. Sometimes his work required him to go up there, but by being careful and keeping on the outside, it would not be so dangerous, but he would generally have a position closer in than was necessary, I thought, and that is the reason I told him that. He would go in up close to these skids, up on the top here, so that when the lumber came down with the force you have described it would likely strike his legs. That is why I told him about this being dangerous there. [208]

Cross-examination.

(By Mr. HAINES.)

I didn't come down here from Minnesota in anybody's interest. I was asked to come here by somebody. I don't know whether it was the Benson Lumber Company or the insurance company brought me here.

Q. Now, do you recall the height of this push-table from the platform as it was at that time?

A. Just about waist high.

Q. How much? A. About waist high.

Q. Aren't you confounding it with the way it is now?

A. It was let down; this is the push-table A.

Q. How high was it at that time?

A. That part of it, you mean?

Q. Yes.

A. Oh, I should say that was 5 feet, or a little better.

There was occasion to go up there once in a while. The same sized timbers came down on that, as it did

(Testimony of Benjamin C. Coffin.)

on below—sometimes as big as 8 inches square, and then 4-inch planks, and 2-inch planks, and boards. As to my best recollection about how the mill worked the first two weeks we put the new machinery in, and whether jams often occur, or gluts, on top of this push-table: the first two weeks, the first week, I don't think I saw there but a few, while I was there the jams did not occur so often as they did afterwards, because the skids became worn afterwards. These heavy timbers coming down over these skids wore them, and sometimes they would lodge there. During the first two weeks, there was a skid broke out,—that is, it was not broken out, it got displaced, it moved to one side and slipped out. [209]

I had worked there about ten days; I did not commence when the machinery was first put in, as I stated before. I was there, I think, ten days or two weeks before the boy was hurt,—somewhere around there. I had not worked there before the machinery was put in. I think I commenced there; it runs in my mind now, about the 15th of July. This accident occurred on the 30th, and the machinery was then just as it is represented there, only that—it was put in just shortly before I went to work there. I had not worked before the machinery was put in. I know nothing about the conditions before the machinery was put in. I went to work after McCann did. I was considered his boss by Mr. McKilty and Evenson. Mr. McKilty hired him. I did not have power to discharge him. I was to

(Testimony of Benjamin C. Coffin.)

look after the work, that was I was placed there for. I was placed there to be the head of this gang of four men, and told that. Before I came there, I think McCann was acting as such. I am not certain about that.

I never saw it necessary to get up on top of this push-table, only this one time, during the time from the 15th of July until the accident occurred. That is the best of my memory. I have been up there,—but it was not necessary. I went up sometimes for various reasons, but most all of the times there would be a little piece of board, these rollers there, as represented, are not high enough to carry the lumber *if* a piece of inch board just under there it stops the whole thing. I did not say on my direct examination that it was quite a frequent thing for men to be on there while the mill was in operation. I said on the lower table. You may be mixed up; I am not. I could not say as to what I would go up there for; [210] sometimes I went up there to fix these skids; it was my place to fix those skids, or his place, McCann's. When he was the boss, before I was there, it was his place to fix them. That is what Evenson told me, to watch those skids, and keep them in their place. I do not remember of McCann's going up there to fix it. I did not say it was McCann's place to do it, after I was there. Several times I climbed up over some lumber piled on the north end here. The tide water was underneath there. As to how I would get on the lumber, it was piled on the ground, solid, high enough to

(Testimony of Benjamin C. Coffin.)

reach from the ground up nearly to the top of that. I would travel over this roller. That is, in that case, you would go over the roller on the north end. There is nothing dangerous about that roller, no spikes in it. And then, at other times, I would climb up on the car here and get over. I would not say how many times that was; it might be once a day, and it might not be more than once in two days. It might be two or three times in one-half day. I cannot say that I ever saw McCann go up there that way over the carts; I might have seen him go up; I cannot say. That is six years ago. I think my recollection is very clear about all the details that occurred there during the two weeks before he got hurt. We were pushed pretty heavily on the day that this accident occurred. It was pretty heavy work, anyway. When we had an 8 by 8, we would double, the four of us, on it, or more if we needed them. Ordinarily we four men were expected to take the whole output of the mill, and handle it. It was part of our work to keep the lumber moving on the push-table there, and on this narrower table. It was a very strenuous work, about as hard a work as I ever did. I think it was the hardest I ever did. If the mill [211] did happen to stop on account of filing the saw, or something of that sort, we worked ten hours. We commenced in the morning at seven o'clock and worked until twelve. And then commenced at one and worked until six. And this is the work we were doing at that time. I do not recall of the mill being stopped at any time to allow

(Testimony of Benjamin C. Coffin.)

the putting in of a skid or fixing it. The lumber used in the skids, as you have them represented there, I think was 4 by 8, or 12, I am not sure,—by 8, I think. I think 4 by 8, at that time it was either 3 by 8 or 4 by 8, I am not certain which. I know I made one of them and put it in myself. All sorts of lumber came down over those skids. Just before I saw McCann jump up on to the carrying-table, the day of the accident, I was standing about the middle of the—partially facing it, and this carrier here. Both of them, both of these tables, pretty nearly, so we could see both. There was a pretty heavy jam at that time. Part of it lay on this lower table and part of it on the skids, these two skids; I don't think there were two together, but the stick got in back here, a 2 by 4, I think it was, like that; this was already jammed with a little board, the way I remember it, down here, like that; when a board got on there these rollers would not have any effect on it to carry it, so this 2 by 4 got in like that, or a 2 by 6, I do not remember which it was, and it stood up endways, and this lumber had jammed here, and this came in up here and made a double jam on it.

When McCann jumped, he jumped on here. I do not know whether he hit a piece of lumber or what, but in jumping there he missed his foothold, or something; whether he went to jump on this piece or that piece I don't know; I remember this lumber down [212] over here, it loosened on and came on through here, and this back here remained

(Testimony of Benjamin C. Coffin.)

on; that is the way I seen it. I had shouted to the trimmer,—he was up in the mill about eighteen or twenty feet from me and down behind the trimmer's table, out of sight from here. I do not think he heard me the first time, but the second time he either heard me or McCann. McCann came from behind me up over this roll.

Q. And leaped up on to the table here?

A. Up on to the table, the way I saw it; if you want me to show, this is not exactly a fair representation of that thing as it was at that time; there was a post here, up there, an upright, and the way I saw him, he put his hand something like that, on here, and hops up on here, and then turns and faces that way.

Then he came right around in front of me. I was standing nearly in the middle of the platform, with my back towards the east and facing towards the middle.

Q. Looking in this direction? A. Yes.

Q. Towards the south?

A. Towards the west.

Q. Southwest? A. Yes, sir.

And McCann came up behind me, he had evidently noticed this jam, and he went around, but there was no lumber there at that time, that is why I came to notice this jump in the first place, and he jumped up from here and stepped over on to the north end of the carrying-table and then attempted to go up there. I don't know what his object was in going up [213] there, but suppose to release that. I

(Testimony of Benjamin C. Coffin.)

could not say what his object was. My impression there at the time, and now is, that a stick of lumber came and hit his foot. It was all done as quick as you can think, and he fell face down, and his foot was in the roll at that time, between the guard and spike and the roller; between this plank that was across in front of the roller and the roller was chewing away on his foot. When I took the boy's foot out of there and turned around, the trimmer stood there watching me. When I lifted the boy up I went right in between and took the boy's foot and pulled it out of there; I pulled him backwards and took him in my arms; I had to pull him back in order to get him. I did not pull him over the roller; he was lying face front on the roller and his foot in there, and of course I pulled him backward off of the roller, not over the roller,—pulled him to the south. I did not pull him over the roller; I lifted him off of the roller; I did not pull him over; I lifted the boy up. I stood in there, right at the corner when I lifted him; there was no platform there.

Q. Where were you standing?

A. I was standing here; there is room enough for a man to stand in here. I say there was three feet of a space there, as the way I remember it, about three feet, and I went here and took the boy in my arms, this way, first pulled his foot out, and took the boy and carried him out of there. I reached in this way around the boy.

I was standing in here in this three-foot space.

Q. Was there a platform on the same level with

(Testimony of Benjamin C. Coffin.)

the loading platform? [214]

A. You don't have to go in there; you can stand here and reach in; it is only about three feet wide; it is wider now.

There is nothing in there, no timbers.

I did not have to stand on this platform and reach over and hold up that boy five feet and seven inches. I pulled him back on this table. I did not pull him over the roller, I lifted him over; he knows how he got over the roller as well as I do. I did not stand on the carrying-table; as I have said two or three times, I stood down here and pulled the boy out this way. You could lift him over the roller without pulling him over the roller.

Shortly after the accident this plank in front of the roller was knocked out by myself; it runs in my mind that way. It was done at nobody's orders. I don't know how long after the accident, but I had no instructions to do it; I knocked it out because I considered it dangerous.

Redirect Examination.

(By Mr. WRIGHT.)

Q. Mr. Coffin, you testified in cross-examination that you came here from Canada at the expense of some parties; who was it that came to you and asked you to talk? A. Where?

Q. From Canada, or Northern Minnesota; do you know who that was? A. Just now—

Q. Just before you came out here.

A. Mr. McFarland.

Q. Had you ever seen him before? [215]

(Testimony of Benjamin C. Coffin.)

A. I suppose I have, but I would not swear to seeing him before; he is the county attorney there.

It was at his instance that I started. I arrived here Saturday morning, I believe,—Saturday of last week,—after this case had been started. I was directed to come direct to your office. I was not subpoenaed. I came of my own accord and of my own free will, that is, I had promised some lawyer,—I do not know who it was,—to come down here if they needed me, and I came according to promise. No one had told me what to testify to before coming here.

I talked with Mr. McCann, the plaintiff, about this accident, and that helped to fix the facts in my mind. I talked with him, I think, somewhere about two years and better ago. I talked it over with him shortly after the accident while he was at the hospital. I went up there and talked it over with him at his request.

Q. Did he want to solicit your services in trying to recover damages against the Benson Lumber Company?

A. Well, I suppose that would be the long and short of it. First, he wanted to know how it happened and all about it; I don't know what I told him how it happened; I told him if I had to go to trial, I would tell the truth as far as I saw it; I think he knew how it happened; I think I told him; I think we talked it over; am pretty sure we did. I do not remember whether I told Mr. McCann there as to how the accident occurred. I perhaps told him about

(Testimony of Benjamin C. Coffin.)

as I have told you here; I don't know just how I told him; he did not ask me if I had ordered him to go up on the push-table, and I don't think I told him then that I had told him to stay down off the carrying-table. I don't think we discussed the details, but I think I told his mother that I considered him reckless. I have talked with her about it. [216]

That shaft was protected with a boxing the full length of it, the whole length on the side and top too; I know that the top was covered at that time. I don't know how many times I told McCann it was dangerous to get up on the carrying-table; I know I told him; I considered he was a man; I thought he was a man grown. I did not know he was a boy; I had no more idea that he was a boy than I have now; he looked as much of a man as he does to-day and I thought he was a man.

When I lifted McCann off of the push-table this roller was not stopped. I took him off before the roller had stopped, and I lifted him over the roller so he could not get hurt.

If I am not mistaken, this was constructed so that there could be a platform, a small one, in here clear across, which elevated one a little above, on which to stand when working on the carrying-table. I am under the impression there was, that it was so we could put it on or take it off. I think it was there at that time, but am not certain about that; that was just a few inches above the platform.

Q. But you generally stood on that when you were working on the carrying-table?

(Testimony of Benjamin C. Coffin.)

A. No, there was nothing here at all.

Q. But you think there was a small one in there?

A. If I am not msitaken there was—it was arranged so we could put other plank in here and have a platform if we wanted to.

I would not say whether that was there at the time. I know Mr. McCann received no injury from being drawed back; I think he helped himself back. We worked together. I took his foot out, pulled it out this way, and I took him in my arms, and he helped himself. [217]

Recross-examination.

(By Mr. HAINES.)

I think there was probably a little platform between this push-table and this carrying-table; it was constructed so that we could have it there if we wanted it. I might have been in between the push-table and the carrying-table when I lifted the boy's foot out, or right at the corner; it is not necessary to be in there to help him, to take him out of there. By his helping himself, lowering himself down, I could take him in my arms and lift him up five feet and seven inches. I pulled his foot out. He did not climb over on to the table; he did not have to.

Q. You stood behind him and pulled him this way? A. I certainly did.

A. And the roller was in motion, of course.

Q. And in pinching him between you and another timber, it didn't hurt him? A. No.

Thereupon the defendant rested.

[Testimony of H. C. McCann for Plaintiff (Recalled in Rebuttal).]

H. C. McCANN, recalled in rebuttal, testifies as follows:

Direct Examination.

(By Mr. HAINES.)

Not to my knowledge was Mr. Coffin the boss of the gang there. I never took any orders from him; I do not recollect anything about him warning me about the carrying-table. When lumber was coming down on the carrying-table I did not go near the skids where it came down at the time it was coming, any more than it was necessary; not when it was sliding down on the skids. I never suffered any injury on the carrying-table. [218] The carrying-table was, I should judge, about three times as wide as the push-table, something or other like that. I never saw any pile of lumber on the north side; in fact, it was tide land down there; I noticed the tide there; we kept dumping trash in there to fill that up. From the push-table down to any ground or solid surface, or other surface, was, I judge, along in the neighborhood of about 15 feet high.

Cross-examination.

(By Mr. WRIGHT.)

I heard the testimony of Mr. Kilty and also of Mr. Coffin in regards to Mr. Coffin being in charge of the men when Mr. Kilty was away, and I cannot say they were mistaken. At the time I was there I never knew that Mr. Coffin was, had any charge

(Testimony of H. C. McCann.)

there any more than what I did, or any of the other men working there at the table. I did not think I was in charge. I know I was not in charge. Mr. Coffin never told me that it was dangerous to get up on that carrying-table. I could not say he is mistaken about that; he might have directed his speech to me, and I might not have heard him, something of the kind like that. I am sure that I have gone up frequently over that carrying-table and over that roller, many times before, and both Mr. Kilty and Mr. Coffin saw me do it.

Plaintiff rested. [219]

Exception No. I.

(Exception No. 1 is waived.)

Exception No. II.

Thereupon both sides rested, and the defendant then and there moved the said Court to direct the jury to return a verdict in favor of the said defendant upon the following grounds:

1. There was no evidence proving or tending to prove any negligence on the part of the defendant.

2. There was no evidence proving or tending to prove that negligence, if any, upon the part of the defendant contributed directly or proximately, or at all, to the injuries sustained by the plaintiff.

3. That it affirmatively appeared from the evidence that the plaintiff himself was guilty of negligence, that is, that said plaintiff did not exercise ordinary care or caution for his own safety and protection, and that the failure upon the part of the plaintiff to exercise ordinary care and caution for his own

safety and protection contributed directly and proximately to the injuries sustained by him.

4. It affirmatively appeared from the evidence that the injuries sustained by plaintiff were the result of a risk assumed by him in the usual course of his employment; that the dog or spike-roller was open, apparent and obvious and the danger of attempting to climb to the push-table or go to the push-table across said roller was an open and obvious risk of which plaintiff fully knew, comprehended and understood and appreciated, or should have, by the exercise of ordinary care on his part have fully known, comprehended and understood and appreciated. Plaintiff was not injured by reason of any concealed or latent danger, but was injured as a result of a danger which was [220] open and obvious and of which plaintiff fully knew and realized, comprehended and understood, or of which he should have fully known, realized, comprehended and understood had he exercised ordinary care for his own safety and protection.

Which said motion of the defendant was then and there denied, to which said ruling the defendant then and there duly excepted, and which the defendant here designates as Exception No. II.

Instructions.

Thereupon the Court, on its own motion, gave to the jury the following instructions:

I.

"Plaintiff sues to recover damages, laid in his complaint at \$25,485.00, for injuries alleged to have been occasioned by defendant's negligence."

II.

“The negligence charged in the complaint is, in substance, that defendant failed to provide a safe place for plaintiff to work and sufficient and safe appliances and other means by which his service was to be performed.”

III.

“The answer denies all the allegations of the complaint as to defendant’s negligence and plaintiff’s damages.

Besides these denials, the answer sets up as a separate defense, that whatever injuries plaintiff suffered were caused by his own carelessness. This carelessness, defendant contends, was plaintiff’s act in jumping from the carrying-table to the push-table over the spiked roller.

Said answer also sets up as a further separate defense that “the injuries sustained by the said plaintiff, if any, were a risk incident to the business in which he was [221] employed, and that prior to receiving such injuries the said plaintiff knew, or, by the exercise of ordinary care upon his part, should have known, of the danger incident to working in the position in which he was; and that said plaintiff fully understood, comprehended and appreciated, prior to receiving such injuries, the dangers incident to the use of the machinery, ways, appliances and structures mentioned in said complaint, and thereafter consented to use the same and continued in the use thereof.”

Exception No. III.

IV.

“The first issue to which the Court directs your

attention is: Was the defendant negligent?

The Court charges you, that negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate human affairs would do, or doing something which a prudent or reasonable man would not do. The question whether or not there was negligence in a particular instance must be determined in the light of all the circumstances and conditions as shown in evidence at the time surrounding the person against whom the negligence is charged.

On this issue, the Court further instructs you that the mere happening of the accident raises no presumption that the defendant corporation was negligent, but the burden of proving negligence by a preponderance of evidence is upon the plaintiff, and the negligence, if any is proven, must be that alleged in the complaint, and, unless such negligence is so proven, your verdict must be for the defendant.”
[222]

To the giving of which instruction the defendant, then and there, in open court, by its counsel, duly excepted, and specially excepted on the ground that there was no evidence proving, or tending to prove, that defendant was guilty of any negligence whatever, or guilty of any negligence, if any, which contributed directly or proximately to the injuries sustained by plaintiff. Which said exception defendant designates as Exception No. III. [223]

Exception No. IV.

V.

“The Court instructs you, that an employer is not

to be held as guaranteeing or insuring the absolute safety of the employee, or the place in which he is to work, but it is the duty of the employer to exercise reasonable care in providing and maintaining a safe place for the employee to work and sufficient and safe material, appliances and other means, by which the service is to be performed. Furthermore, this duty of the employer to exercise reasonable care in providing a safe place, appliances and other means for the employee cannot be delegated to a servant so as to exempt the former from liability for injuries caused to another servant by its omission. The servant does not undertake to incur the risk arising from negligence in providing or maintaining a safe place in which he is to work, or suitable and safe appliances, or other means with which his service is to be performed. His contract implies that, in regard to these matters, his employer will exercise reasonable care in making adequate provision that no danger shall ensue to him, and he has a right to assume and rely and act upon the assumption that such care has been exercised."

To the giving of which instruction the defendant then and there, in open court, duly excepted to the whole thereof, and specially excepted to the following portion of said instruction: "The servant does not undertake to incur the risk arising from negligence in providing or maintaining a safe place in which he is to work, or suitable and safe appliances, or other means with which his service is to be performed. His contract implies that, in regard to these [224] matters, his employer will exercise reasonable

care in making adequate provision that no danger shall ensue to him, and he has a right to assume and rely and act upon the assumption that such care has been exercised," on the ground that a servant assumed the risk of all negligence of the master of which he knew, fully comprehended or understood and appreciated, or of which he should, by the exercise of ordinary care on his part, have known, fully comprehended, understood and appreciated, that is, if the servant is negligently provided an unsafe place in which to work, or unsafe machinery or appliances with which to work and knew of the unsafety thereof and fully comprehended, understood and appreciated, the danger incident to working in said unsafe place or with unsafe machinery, tools or appliances, he assumed the risk thereof. That the contract of employment between the employer and employee does not imply that an employer will exercise reasonable care in making adequate provision that no danger shall ensue to the employee, and that all that is required is that the employer will exercise ordinary care to provide a reasonably safe place in which the employee shall work and reasonably safe appliances with which to work; that the employee has no right to assume or rely or act upon the assumption that a place is reasonably safe where there are open, apparent and obvious dangers; that, in the case at bar, there was no evidence that the place in which plaintiff was to work or appliances with which to work were unsafe, provided the employee used the place in which to work and the materials with which to work with reasonable care; that the spiked

or dog-roller over which plaintiff stepped and which caused [225] his injuries was open and apparent; that the danger incident to stepping over said roller or attempting to step over same was an open, apparent and obvious danger which the plaintiff, or any other person should have known, fully comprehended and appreciated and understood by exercising ordinary care; that the plaintiff would not have a right to shut his eyes to an open and obvious peril, nor had he any right to assume that the spiked or dog-roller was safe, or to indulge in any assumption that there was no hazard in attempting to step over it, or to step on to the push-table; that the plaintiff knew that lumber of all sizes was constantly and rapidly being run upon the push-table and passing over the same, and the danger of getting upon the push-table, or over or across the dog-roller was open and apparent and obvious and that the plaintiff knew thereof, fully appreciated, comprehended and understood the danger incident thereto, or should have fully known, comprehended and appreciated the danger incident thereto had he been exercising ordinary care or caution, and he had no right to indulge in any presumption or assumption of safety in getting to the push-table over the dog-roller, which was contrary to the facts, which he knew or should have known, which exception defendant designates as Exception No. IV.

Exception No. V.

VI.

“The Court further instructs you, that, if the place where plaintiff was working and the machinery with

which he worked at the time of the accident were unsafe, as alleged in the complaint, but plaintiff knew them to be unsafe, and fully understood, comprehended and appreciated the dangers incident to their use, then defendant would not be chargeable with negligence in assigning him to the work in which he was [226] engaged when injured.”

To the giving of which said instruction the defendant then and there, in open court, duly excepted to the whole of said instruction, and specially excepted for the reason that the servant not only assumed the risk of working with unsafe machinery and in an unsafe place, which he fully understood, comprehended and appreciated the dangers incident thereto, but also assumed the risk of working with defective and dangerous machinery where he would have fully understood, comprehended and appreciated the danger incident thereto if he had exercised ordinary care and caution. Which said exception defendant designates as Exception No. V. [227]

Exception No. VI.

VII.

“The Court further instructs you, that, at the time plaintiff was injured, there was in force a statute of California, which contains the following provision:

‘Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer, shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defec-

tive machinery, ways, appliances or structures, and therefore consented to use the same or continued in the use thereof.'

This statute applies to the consideration by you of the entire evidence in its bearing upon the allegations of the complaint charging the defendant with negligence, and the allegations of the answer denying the negligence so charged and charging the plaintiff with negligence, and with having assumed the risk incident to the business and work in which he was employed and with having contributed to his alleged injury by his own concurring negligence."

To the giving of which said instruction the defendant then and there, in open court, duly excepted, and specially excepted upon the ground that said instruction did not state to the jury that a servant assumed the risk of the danger incident to working about defective or unsafe ways, machinery, appliances or structures which the servant should have fully understood, comprehended and appreciated if he had exercised ordinary care. Which exception defendant designates as Exception No. VI. [228]

Exception No. VII.

VIII.

"The Court further instructs you, that, in passing upon the question whether plaintiff did fully understand, comprehend and appreciate the dangers incident to the place where and the machinery with which he was working, it is proper for you to consider, with all the other evidence, the evidence as to the age, experience and maturity of judgment of the plaintiff at the time the injury was received.

“Where a master employs a servant to do dangerous work, or to do work that must necessarily require him to move in and about moving machinery of a dangerous nature, who, from youth, inexperience, ignorance or want of capacity may fail to appreciate the danger surrounding him by such work, and the master knows, or by the exercise of ordinary care, could know, of the servant’s failure to appreciate the danger incident to his work, it is a breach of duty for the master to expose such servant, even with his own consent, to such danger, or to place him in a position where it shall become necessary for him to encounter the same, without first giving him such full and complete instructions as will enable him to fully and completely comprehend them and to do the work safely and with proper care on the servant’s part.”

To the giving of which instruction the defendant then and there, in open court, duly excepted, and specially excepted upon the ground that said instruction limited the jury to inquiries whether plaintiff did fully understand, comprehend and appreciate the danger incident to the place or the [229] machinery with which he was working and did not direct them or permit them to inquire whether plaintiff should have fully understood, comprehended or appreciated the danger incident to the place in which he was working or the machinery with which he was working had he been exercising ordinary care, and further that there was no evidence to warrant the second paragraph of said instruction or to justify the Court in submitting it to the said jury. There was no evidence in the case to warrant the jury in find-

ing that the plaintiff either from his youth, inexperience, ignorance or want of capacity failed to appreciate the danger surrounding him by his work or that the defendant knew, or by the exercise of ordinary care should have known that plaintiff was unable to appreciate the danger, if any there was, surrounding him in his work or that the said plaintiff, by reason of youth, inexperience, ignorance or want of capacity would fail, or did fail to appreciate the danger, if any there was, surrounding him at the time of his work, or that the defendant had any knowledge that the said plaintiff was a minor or did not have sufficient age, experience, or capacity to appreciate the open and obvious danger surrounding him in his work, nor was there any evidence in the case that the defendant did not give to the plaintiff full and complete instructions as to his work and the dangers incident thereto, nor is there any evidence that the plaintiff did not fully and completely comprehend the dangers incident to his work or how to do the work safely or with proper care upon his part. Which exception defendant designates as Exception VII. [230]

Exception No. VIII.

IX.

“The Court further instructs you, that, if the plaintiff was, by reason of his youth or inexperience, of such immature judgment and incapacity as to be unable to understand, comprehend and appreciate the dangers incident to his work, still it was not negligent for the defendant to place him upon such work, unless the defendant knew, or had reason to believe,

that the plaintiff was of such immature judgment or so incapacitated, and, in determining this last question, you will consider in connection with all the other evidence in the case, the personal appearance and conduct of the plaintiff at the time of his employment and assignment to said work by the defendant."

To the giving of which said instruction the defendant then and there, in open court, duly and regularly excepted to the whole thereof; and specially excepted to the following portion: "And, in determining this last question you will consider, in connection with all the other evidence in the case, the personal appearance and conduct of the plaintiff at the time of his employment and assignment to said work by the defendant," upon the ground that there was no evidence as to the personal appearance or conduct of the plaintiff at the time of his employment and assignment to work or any evidence tending to show that he appeared or conducted himself other than as an adult and a person fully able to comprehend, appreciate and understand an open, apparent and obvious danger and fully understand, comprehend and appreciate the kind and character of the work to which he was assigned, which exception defendant designates as Exception VIII. [231]

X.

"The jury are instructed that if you find from the evidence that plaintiff was a minor on the 30th day of July, 1907, at the time he received the injuries complained of, and you should further find, from the evidence, that the dangers, if any, to which he was

exposed in working on and about the push-table and carrying-table connected with defendant's sawmill, were not concealed, but that plaintiff had full knowledge of and fully comprehended and appreciated the dangers incident to the ordinary use of the machinery, ways, appliances and structures with, upon or about which he was required to work, and with such knowledge and understanding continued in the employment of defendant and continued in the use of such machinery, ways, appliances and structures, then plaintiff assumed the risks of his employment, and defendant was not required to warn him of the same." [232]

XI.

"The Court further instructs you, that the proximate cause of an injury in a damage case is that cause which naturally led to and which by a prudent person might reasonably have been expected to be instrumental in producing the injury complained of. In determining whether a certain act is the proximate cause of an injury, the proper test is: Was the injury complained of, of such a character as might reasonably have been foreseen, or reasonably have been expected to follow as the result of such an act? The rule of proximate cause has the same application in a damage suit in which a minor is plaintiff as in the case of an adult."

Exception No. IX.

XII.

"Whether or not defendant was negligent as charged in the complaint, and, if so, whether or not such negligence proximately caused plaintiff's in-

juries, are questions of fact submitted to you for determination without any expression of opinion thereon by the Court.

If the evidence fails to satisfy you that the defendant was negligent as alleged in the complaint, or, that its negligence, if any, was a proximate cause of plaintiff's injuries, your verdict will be for the defendant.

If, however, you believe from the evidence that defendant was negligent as alleged in the complaint, and that such negligence was a proximate cause of plaintiff's injuries, you will next consider the affirmative defenses which I have already mentioned, and about which I will now more fully instruct you."

[233]

To the giving of which instruction the defendant then and there, in open court, duly excepted on the ground that there was no evidence proving, or tending to prove that defendant was guilty of any negligence whatever, or any negligence which contributed directly or proximately, or at all, to the injuries sustained by plaintiff; that it also appeared from the evidence that the plaintiff himself was guilty of contributory negligence and that he was injured as a result of an open, obvious and apparent risk, the danger of which he fully comprehended, knew, appreciated and understood, or should, by the exercise of ordinary care upon his part, have fully known, comprehended and appreciated and understood; which exception defendant designates as Exception No. IX.

XIII.

"Contributory negligence is such an act or omis-

sion on the part of the person injured, amounting to a want of ordinary care, as, concurring and co-operating with any negligent act or omission on the part of the defendant, was a proximate cause of the injury.

Ordinary care is such care as would be used by an ordinarily prudent person in the same or similar circumstances."

Exception No. X.

XIV.

"The Court further instructs you that the ordinary care which a youth of limited judgment and experience is called upon to exercise is not the same *quantum* of care which the adult would be called upon to use under the same circumstances. Each is required to use ordinary care, but the care which the person of mature intelligence and judgment must employ is different from the amount which the law exacts [234] of a youth of immature age, judgment and experience."

To the giving of which instruction the defendant then and there, in open court, duly excepted to the whole thereof, and specially excepted to it upon the ground that there was no evidence to warrant the jury in finding that the plaintiff in the case at bar possessed limited judgment or experience, nor was there any evidence to warrant the jury in finding that plaintiff was not as competent as an adult to fully comprehend, appreciate and understand the danger of the work which he was performing, or the appliances about which he was working, and further specially excepted to the following portion of said

instruction: "Each is required to use ordinary care, but the care which the person of mature intelligence and judgment must employ is different from the amount which the law exacts of a youth of immature age, judgment and experience," on the ground that the law does not exact a different amount of care from an adult than from a youth. That each is required to exercise ordinary care and *as* is required to guard himself from open and obvious dangers which he knows, comprehends, appreciates and fully understands, or should by the exercise of ordinary care upon his part have fully appreciated, known, comprehended and understood, which said exception defendant designates as Exception No. X.

Exception No. XI.

XV.

"The burden of proof of contributory negligence is upon the defendant, to establish the same by a preponderance of the evidence, unless you find from the plaintiff's own [235] testimony that he was guilty of contributory negligence."

To the giving of which instruction the defendant then and there, in open court, duly excepted, and specially excepted upon the ground that the defendant may avail itself both of the evidence offered by plaintiff and by defendant, and it is not bound to establish by a preponderance of the evidence contributory negligence upon the part of the plaintiff unless the same appears affirmatively from plaintiff's own testimony, that the defendant to establish contributory negligence may use said testimony or evidence offered by plaintiff, together with testimony and evi-

dence offered by itself; that the instruction placed a burden upon the defendant of proving contributory negligence unless the same should affirmatively appear from plaintiff's testimony and the jury must have been led to believe that if it did not appear affirmatively from plaintiff's testimony they could not consider evidence, if any, offered by plaintiff which tended to show contributory negligence upon the part of the plaintiff, which exception defendant designates as Exception No. XI.

Exception No. XII.

XVI.

“The Court further instructs you that plaintiff, although a minor, on entering defendant's employment, assumed all the ordinary risks of such employment which he fully knew, understood, comprehended and appreciated.”

To the giving of which instruction the defendant [236] then and there, in open court, duly excepted to the whole thereof, and specially excepted upon the ground that the plaintiff not only assumed all the ordinary risks of the employment which he fully knew, understood, comprehended and appreciated, but also assumed all the risks of his employment, whether ordinary or otherwise, of which he fully knew, understood, comprehended and appreciated, and also that plaintiff assumed all the risk incident to his employment of which he should have fully known, understood, comprehended and appreciated by the exercise of ordinary care, which exception defendant designates as Exception No. XII.

Exception No. XIII.**XVII.**

“Whether or not plaintiff was guilty of contributory negligence, or whether or not his injuries resulted from the ordinary risks of his employment, which he assumed, are also issues which the Court submits to your determination without expressing any opinion thereon.”

To the giving of which instruction the defendant, [237] then and there, in open court, duly excepted, and specially excepted upon the ground that it appeared from the evidence that plaintiff was guilty of contributory negligence as a matter of law, and therefore the question ought not to be submitted to the jury, and it further appeared from the undisputed evidence that plaintiff was injured by a risk which he fully knew, comprehended, understood and appreciated, or should have fully known, comprehended, understood and appreciated, had he exercised ordinary care, and that therefore the issue should have not been submitted to said jury, and, further, that the Court should not limit the question as to whether plaintiff was injured by an ordinary risk of his employment which he assumed, for the reason that plaintiff assumed all risk of his employment, whether ordinary or extraordinary, of which he knew, fully comprehended, appreciated and understood, or which by the exercise of ordinary care on his part he should have fully known, comprehended, appreciated and understood. Which said exception defendant designates as Exception No. XIII.

Exception No. XIV.**XVIII.**

“If the evidence fails to satisfy you that the defendant is negligent in any of the particulars alleged in the complaint, or, if you find that defendant was so negligent, but the evidence fails to satisfy you that said negligence was the proximate cause of plaintiff’s injuries, or, if you believe from the evidence that plaintiff, prior to his injuries, knew of the unsafe condition of defendant’s structures and machinery, which plaintiff claims caused said injuries, if they were unsafe, and fully understood, comprehended and appreciated the dangers incident to their [238] use, and thereafter continued in defendant’s employ, or, if you believe from the evidence that plaintiff was in any way negligent, and that such negligence directly contributed to his injuries, your verdict will be for the defendant.

If, however, you believe from the evidence that the defendant was negligent as alleged in the complaint, and that said negligence was the proximate cause of plaintiff’s injuries, without contributory negligence on his part, and without knowledge by him, prior to his injuries, of the unsafe condition of defendant’s structures and machinery, or full understanding, comprehension and appreciation by him of the dangers incident to their use, your verdict will be for the plaintiff.”

To the giving of which instruction the defendant then and there, in open court, duly excepted to the whole of said instruction, and specially excepted on the ground that there was no evidence justifying the submission of said cause to the jury and no evi-

dence proving or tending to prove that defendant was guilty of any negligence; and on the ground that it further appeared from the evidence that the plaintiff himself was guilty of negligence that is a want of ordinary care and caution which contributed directly and proximately to the injuries sustained by him and that he was injured as a result of a risk which he assumed, the danger of which was open, apparent and obvious and which he fully knew, comprehended, understood and appreciated, or which he should have fully known, comprehended, understood and appreciated had he been exercising ordinary care for his own safety and protection, [239] and further specially excepted to the following portion of said charge: "If, however, you believe from the evidence that the defendant was negligent as alleged in the complaint, and that said negligence was the proximate cause of plaintiff's injuries, without contributory negligence on his part, and without knowledge by him, prior to his injuries, of the unsafe condition of defendant's structures and machinery, or full understanding, comprehension and appreciation by him of the dangers incident to their use, your verdict will be for the plaintiff," upon the ground that there was no evidence that defendant was guilty of negligence which was the proximate, or any, cause of plaintiff's injuries, and upon the ground that plaintiff was guilty of contributory negligence and on the ground that it further appeared from the evidence that prior to his injuries plaintiff had knowledge, or should have had knowledge of any unsafe condition, if any,

of defendant's structure and machinery, and fully understood, comprehended and appreciated the danger, if any there was, incident to the use thereof, or should have fully understood, comprehended and appreciated such danger, if any there was, incident to the use of defendant's structure or machinery, if the said plaintiff had been exercising ordinary care, and on the ground further that the said portion of the instruction directed the jury to find a verdict in favor of plaintiff if he was injured by reason of any defective or dangerous structure or machinery of which the plaintiff did not actually know, fully understand, comprehend or appreciate the dangers incident thereto, even though [240] the plaintiff should have known, fully understood, comprehended and appreciated such dangers had he been exercising ordinary care; in other words, said instruction authorized the plaintiff to recover if he did not actually know, fully understand, comprehend and appreciate the dangers incident to working about the structure or machinery of said defendant, even though his failure to have such actual knowledge, comprehension, understanding and appreciation was by reason of the absolute inattention, carelessness and negligence on his part, which said exception defendant designates as No. XIV. [241]

Exception No. XV.

XIX.

“If you find for the plaintiff, it will be your duty to assess the amount of damages he is entitled to recover, and, in estimating these damages, you may consider his age, what, before the accident, was his

health and physical condition, the extent to which the injuries he received are permanent and will affect his health and physical condition in the future, and also his bodily pain and mental anguish, if any, which he has or will proximately—that is, naturally and without the intervention of some other cause—result from said injuries, and allow plaintiff such sum for damages as in your opinion will fairly compensate him for all of said injuries.”

To the giving of which instruction the defendant then and there, in open court, duly excepted, on the ground that there was no evidence justifying the submission of said cause to the jury or the award by the jury of damages to the plaintiff, which said exception defendant designates as Exception No. XV.

XX.

“The Court further instructs you that, in considering your verdict, you should not be governed by sympathy or prejudice for or against either party.”

XXI.

“The Court further instructs you that before a verdict can be returned it must be concurred in by each of the twelve jurors sworn to try the case.”
[242]

Exception No. XVI.

The defendant requested the Court to give to the jury the following instruction:

I.

“The jury are instructed that it was the duty of the defendant in this case to use only ordinary care in furnishing to the plaintiff at and before the

time of the accident complained of, a reasonably safe place and reasonably safe surroundings in which to work, and to use reasonable care in maintaining and keeping such place in a reasonably safe condition."

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which exception defendant designates as Exception No. XVI.

Exception No. XVII.

The defendant requested the Court to give to the jury the following instruction:

II.

"Negligence on the part of defendant is not presumed. It is an affirmative fact which plaintiff must prove by a preponderance of the evidence, and the negligent acts proved, if any, must be such particular acts as are alleged in the plaintiff's complaint. The burden of proof is on the plaintiff, and if you find that the evidence bearing on the question of negligence on the part of defendant is evenly balanced, or that it preponderates in favor of the defendant, then and in that case the plaintiff cannot recover and your verdict must be for the defendant."

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XVII. [243]

Exception No. XVIII.

The defendant requested the Court to give to the jury the following instruction:

III.

“The defendant was under no obligation to keep the plaintiff absolutely safe and free from danger, nor to insure the plaintiff against accident. His duty, to express it tersely, was to use ordinary care to secure the plaintiff’s safety. ‘Ordinary care,’ you are instructed, is the care that is ordinarily exercised by a person of average prudence under the same or similar circumstances. Just what that degree of care is or would be, is for the jury to determine. Having determined what, under the circumstances, would have been ordinary care, it is for you to say whether such care was exercised by the defendant about the premises in question.”

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XVIII.

Exception No. XIX.

The defendant then requested the Court to give to the jury the following instruction:

IV.

“The jury are instructed that the defendant was not bound as an insurer to the absolute safety and suitability of the machinery and appliances furnished by it for use in its business, and that it was not bound to furnish the very best or most improved kind of machinery to be used at its mills. It was sufficient if the appliances connected with the same

were reasonably safe and suitable for the purposes for which they were used.” [244]

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XIX.

Exception No. XX.

The defendant requested the Court to give to the jury the following instruction:

V.

“The Court instructs you that if you believe from the evidence that the plaintiff was not using ordinary care at the time and place of his injury, and that his failure to use such care directly contributed to cause his injury, then you will find for the defendant, and you are instructed that ordinary care is such care as would be used by an ordinarily prudent person under the same or similar circumstances.”

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception XX.

Exception No. XXI.

The defendant then requested the Court to give to the jury the following instruction.

VI.

“You are further instructed that if there were any latent or obscure dangers or defects connected with the machinery in and about which plaintiff worked, that it was then the duty of the defendant to explain such latent defects or obscure dangers to the plain-

tiff and warn him of the dangers connected therewith. But if you shall find from the evidence [245] that the only dangers connected with the machinery around which plaintiff was employed were in plain view, and were not in any respect hidden, and were such dangers that the plaintiff had full knowledge of and fully comprehended and appreciated, then and in such event no obligation existed on the part of the defendant to warn plaintiff of the danger of his employment and if injured under such circumstances, then plaintiff cannot recover."

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXI.

Exception No. XXII.

The defendant requested the Court to give to the jury the following instruction:

VII.

"The jury are further instructed that if you find from the evidence that plaintiff was a minor on the 30th day of July, 1907, at the time he received the injuries complained of and you should further find, from the evidence, that the dangers, if any, to which he was exposed in working on and about the push-table and carrying-table connected with defendant's sawmill were not concealed, but that plaintiff had full knowledge of and fully comprehended and appreciated the dangers incident to the ordinary use of the machinery, ways, appliances and structures with, upon or about which he was required to work,

and with such knowledge and understanding continued in the employment of the defendant and continued in the use of such machinery, ways, appliances and structures, then and in that event the defendant was not required to warn the plaintiff of [246] such dangers and the plaintiff thereby assumed the risks of his employment and is not entitled to a verdict against the defendant for damages growing out of his injuries sustained by reason of the accident set forth in the complaint."

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXII.

Exception No. XXIII.

The defendant requested the Court to give to the jury the following instruction:

VIII.

"The proximate cause of an injury in a damage case is that cause which naturally led to and which by a prudent person might reasonably have been expected to be instrumental in producing the injury complained of. In determining whether a certain act is the proximate cause of any injury, the proper test is: 'Was the injury complained of, of such a character as might reasonably have been foreseen, or reasonably have been expected to follow as the result of such an act.' The rule of proximate cause has the same application in a damage suit in which a minor is plaintiff, as in the case of an adult."

Which the Court refused to give, and to the re-

fusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXIII. [247]

Exception No. XXIV.

The defendant requested the Court to give to the jury the following instruction:

IX.

“The jury are instructed that in the present action plaintiff seeks to recover damages by reason of certain injuries alleged to have been sustained by him and growing out of the alleged negligence of the defendant. Negligence which will entitle plaintiff to recover, and which plaintiff must prove before he will be entitled to a verdict, consists in the failure of the defendant to do that which a person of ordinary prudence and intelligence would do under the same or similar circumstances, or in the doing of that which a person of ordinary prudence or intelligence would not have done under the same or similar circumstances, and before you will be justified in returning a verdict for the plaintiff in this case, it will be necessary for you to find, from the evidence, that the defendant in the construction and operation of the machinery, ways, appliances and structures about which plaintiff was employed had omitted to take such precautions to prevent injury to the plaintiff, as an ordinarily prudent and intelligent person would have taken under the same or similar circumstances, or that defendant had done something which an ordinarily prudent and intelligent person would not have done under the same or

similar circumstances.”

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXIV. [248]

Exception No. XXV.

The defendant requested the Court to give to the jury the following instruction:

X.

“The jury are instructed that if the defendant did not know as a matter of fact that plaintiff was a minor at the time of his employment, or that the defendant was not in possession of facts and circumstances, from which it should have known that the plaintiff was a minor, then no greater obligation rested upon the defendant to warn the plaintiff of dangers that were apparent and were not concealed or hidden than there would have been to warn a man who have reached his majority. In taking into consideration the age of the plaintiff, defendant had a right to rely upon the conduct and demeanor of the plaintiff, his size, appearance and ability to do a man’s work.”

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXV.

Exception No. XXVI.

The defendant requested the Court to give to the jury the following instruction:

XI.

“The jury are hereby instructed that if they shall find from the evidence that plaintiff had knowledge of the fact that there were two ways by means of which he could have climbed upon the push-table—the one way being to step over the spiked roller and the other way being to climb over the side of the push-table, by means of the lumber buggies; the [249] first way being extremely dangerous and so known to him to be, and the other way safe and known by him to be so. And if you shall believe from the evidence that he voluntarily chose the dangerous way of going upon said push-table, when there was no occasion or necessity for so doing, and in so doing received the injury of which he complains, that he cannot hold the defendant responsible for an injury which directly resulted from his voluntary and unnecessary choice of the more dangerous of the two ways of doing the work he attempted to do.”

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXVI.

Exception No. XXVII.

The defendant requested the Court to give to the jury the following instruction:

XII.

“The law requires of a minor suing for personal injuries, care and prudence equal to his capacity, and if you find from the evidence that the plaintiff

in this action knew of the character of the machine which caused his injury and was aware of its dangerous character and carelessly and negligently tried to step over the spiked roller onto the push-table, so that his injury occurred or was inflicted without fault on the part of the defendant, then your judgment will be in favor of the defendant.”

Which the Court refused to give and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception XXVII. [250]

No other or further instructions were given to the jury by the Court than are set out in this Bill of Exceptions and each and all of the exceptions hereinbefore set out taken to the charge of the Court and to the various instructions given by the Court to the jury as hereinbefore set out, and each and all of the exceptions taken by the defendant to the refusal of the Court to give each of the instructions which were requested and which were refused as hereinbefore set out, were taken and reserved by the counsel for defendant, in open court, before the jury had been directed to retire and consider their verdict and while the jury was present in court.

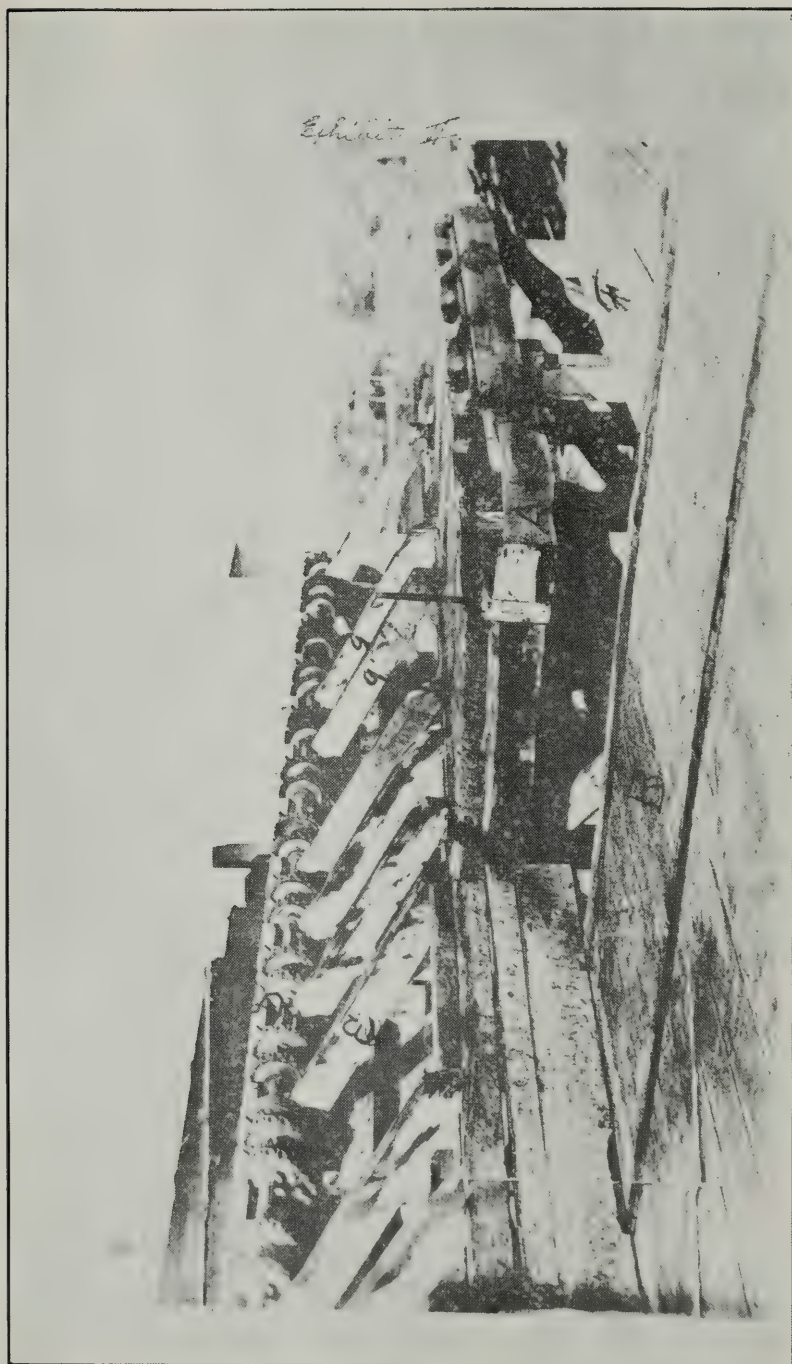
Thereupon, and after the jury had retired to consider their verdict, the Court duly made and entered an order giving the defendant to and including the 6th day of October, 1913, within which to serve and file its Bill of Exceptions, and thereafter the said parties stipulated that the defendant should have to and including the 20th day of November, 1913,

within which to serve and file its said Bill of Exceptions, and upon which said stipulation the Court duly and regularly made an order giving said defendant to and including the 20th day of November, 1913, within which to serve and file its Bill of Exceptions, and the said Bill of Exceptions has been prepared, served and filed within the time by law, and as extended by stipulations of counsel and the order of the Court, and counsel for defendant asks that the same be allowed and approved as correct.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,

Attorneys for Defendant. [251]

[Plaintiff's Exhibit II.]



**[Stipulation for Settlement of Bill of Exceptions,
etc.]**

IT IS HEREBY STIPULATED that the foregoing Bill of Exceptions has been duly and regularly served and filed within the time allowed by the stipulation of the respective parties hereto and by the order of the Court duly and regularly made, and that said Bill of Exceptions is correct in all respects and may be settled and made a part of the record herein.

HUNSAKER & BRITT,
HAINES & HAINES,

Attorneys for Plaintiff.

GIBSON, DUNN & CRUTCHER,
LOBDELL,

WRIGHT & WINNEK,

Attorneys for Defendant. [254]

Order Approving Bill of Exceptions.

The foregoing Bill of Exceptions, duly proposed and agreed upon by counsel for the respective parties, is correct in all respects and is hereby approved, allowed and made a part of the record herein.

Dated this 5th day of Jan., 1914.

OLIN WELLBORN,
Judge.

**[Stipulation That Bill of Exceptions was Filed in
Due Time, etc.]**

It is hereby stipulated that the foregoing bill was filed within due time and that it be signed and settled by the Judge with the same force and effect

as though signed and settled on the 20 day of Nov., 1913.

HUNSAKER & BRITT and
HAINES & HAINES,

Attys. for Plff.

WRIGHT & WINNEK,

GIBSON, DUNN & CRUTCHER,

Attorneys for Def. [255]

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

H. C. McCANN, by JESSE F. McCANN, His Guard-
ian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the defendant above named and filed the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, petition for which writ it filed at the same time with this assignment.

I.

The Court erred in denying the motion of the defendant to direct the jury to return a verdict in favor of said defendant, as set forth in Exception No. II, Bill of Exceptions, which said motion was as follows:

“Both sides having rested the defendant then and

there moved the said Court to direct the jury to return a verdict in favor of the said defendant upon the following grounds:

“1. There was no evidence proving or tending to prove any negligence on the part of the defendant.

“2. There was no evidence proving or tending to prove that negligence, if any, upon the part of the defendant contributed directly or proximately, or at all, to the injuries sustained by the plaintiff.

“3. That it affirmatively appeared from the evidence that the plaintiff himself was guilty of negligence, that is that said plaintiff did not exercise ordinary care or caution [256] for his own safety and protection, and that the failure upon the part of the plaintiff to exercise ordinary care and caution for his own safety and protection contributed directly and proximately to the injuries sustained by him.

“4. It affirmatively appeared from the evidence that the injuries sustained by plaintiff were the result of a risk assumed by him in the usual course of his employment; that the dog or spike roller was open, apparent and obvious and the danger of attempting to climb to the push-table or go to the push-table across said roller was an open and obvious risk of which plaintiff fully knew, comprehended and understood and appreciated, or should have, by the exercise of ordinary care on his part, have fully known, comprehended and understood and appreciated. Plaintiff was not injured by reason of any concealed or latent danger but was injured as a result of a danger which was open and obvious and

of which plaintiff fully knew and realized, comprehended and understood, or of which he should have fully known, realized, comprehended and understood had he exercised ordinary care for his own safety and protection.”

II.

The Court erred in giving instruction number IV to the jury as follows:

“The first issue to which the Court directs your attention is: Was the defendant negligent?

“The Court charges you, that negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate human affairs would do, or doing something which a prudent or reasonable man would not do. The question whether or not there was negligence in a particular instance, must be determined in the light of all the circumstances and conditions as [257] shown in evidence at the time surrounding the person against whom the negligence is charged.

“On this issue, the Court further instructs you, that the mere happening of the accident raises no presumption, that the defendant corporation was negligent, but the burden of proving negligence by a preponderance of evidence is upon the plaintiff, and the negligence, if any is proven, must be that alleged in the complaint, and, unless such negligence is so proven, your verdict must be for the defendant.”

As set forth in Exception No. III of the Bill of Exceptions.

III.

The Court erred in giving instruction number V

to the jury as follows:

“The Court instructs you, that an employer is not to be held as guaranteeing or insuring the absolute safety of the employee, or the place in which he is to work, but it is the duty of the employer to exercise reasonable care in providing and maintaining a safe place for the employee to work and sufficient and safe material, appliances and other means, by which the service is to be performed. Furthermore, this duty of the employer to exercise reasonable care for the employee cannot be delegated to a servant so as to exempt the former from liability for injuries caused to another servant by its omission. The servant does not undertake to incur the risk arising from negligence in providing or maintaining a safe place in which he is to work, or suitable and safe appliances, or other means with which his service is to be performed. His contract implies that, in regard to these matters, his employer will exercise reasonable care in making adequate provision that [258] no danger shall ensue to him, and he has a right to assume and rely and act upon the assumption, that such care has been exercised.”

As set forth in Exception No. IV of the Bill of Exceptions.

IV.

The Court erred in giving instruction number VI to the jury as follows:

“The Court further instructs you, that, if the place where plaintiff was working and the machinery with which he worked at the time of the accident were unsafe, as alleged in the complaint, but plain-

tiff knew them to be unsafe, and fully understood, comprehended and appreciated the dangers incident to their use, then defendant would not be chargeable with negligence in assigning him to the work in which he was engaged when injured."

As set forth in Exception No. V of the Bill of Exceptions.

V.

The Court erred in giving instruction number VII to the jury as follows:

"The Court further instructs you, that, at the time plaintiff was injured, there was in force a statute of California which contains the following provision:

"Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer, shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and therefore consented to use the same or continued in the use thereof." [259]

"This statute applies to the consideration by you of the entire evidence in its bearing upon the allegations of the complaint charging the defendant with negligence, and the allegations of the answer denying the negligence so charged and charging the plaintiff with negligence, and with having assumed the risk incident to the business and work in which he was employed and with having contributed to his

alleged injury by his own concurring negligence.”

As set forth in Exception No. VI of the Bill of Exceptions.

VI.

The Court erred in giving instruction No. VIII to the jury as follows:

“The Court further instructs you, that, in passing upon the question whether plaintiff did fully understand, comprehend and appreciate the dangers incident to the place where and the machinery with which he was working, it is proper for you to consider, with all the other evidence, the evidence as to the age, experience, and maturity of judgment of the plaintiff at the time the injury was received.

“Where a master employs a servant to do dangerous work, or to do work that must necessarily require him to move in and about moving machinery of a dangerous nature, who, from youth, inexperience, ignorance or want of capacity may fail to appreciate the danger surrounding him by such work, and the master knows, or by the exercise of ordinary care, could know, of the servant’s failure to appreciate the danger incident to his work, it is a breach of duty for the master to expose such servant, even with his own consent, to such danger, or to place him in a position where it shall become necessary for him to encounter the same, without first giving him such full and complete [260] instructions as will enable him to fully and completely comprehend them and to do the work safely and with proper care on the servant’s part.”

As set forth in Exception No. VII of the Bill of Exceptions.

VII.

The Court erred in giving instruction number IX to the jury as follows:

“The Court further instructs you, that, if the plaintiff was, by reason of his youth or inexperience, of such immature judgment and incapacity as to be unable to understand, comprehend and appreciate the dangers incident to his work, still it was not negligent for the defendant to place him upon such work, unless the defendant knew, or had reason to believe, that the plaintiff was of such immature judgment or so incapacitated, and, in determining this last question, you will consider, in connection with all the other evidence in the case, the personal appearance and conduct of the plaintiff at the time of his employment and assignment to said work by the defendant.”

As set forth in Exception No. VIII of the Bill of Exceptions.

VIII.

The Court erred in giving instruction number XII to the jury as follows:

“Whether or not defendant was negligent as charged in the complaint, and, if so, whether or not such negligence proximately caused plaintiff’s injuries, are questions of fact submitted to you for determination without any expression of opinion thereon by the Court.”

“If the evidence fails to satisfy you that the defendant was negligent as alleged in the complaint,

or that its negligence, if any, was a proximate cause of [261] plaintiff's injuries, your verdict will be for the defendant.

"If, however, you believe from the evidence, that defendant was negligent as alleged in the complaint, and that such negligence was a proximate cause of plaintiff's injuries, you will next consider the affirmative defenses which I have already mentioned, and about which I will now more fully instruct you."

As set forth in Exception No. IX of the Bill of Exceptions.

IX.

The Court erred in giving instruction number XIV to the jury as follows:

"The Court further instructs you that the ordinary care which a youth of limited judgment and experience is called upon to exercise is not the same *quantum* of care which the adult would be called upon to use under the same circumstances. Each is required to use ordinary care, but the care which the person of mature intelligence and judgment must employ is different from the amount which the law exacts of a youth of immature age, judgment and experience."

As set forth in Exception No. X of the Bill of Exceptions.

X.

The Court erred in giving instruction number XV to the jury as follows:

"The burden of proof of contributory negligence is upon the defendant, to establish the same by a preponderance of the evidence, unless you find from

the plaintiff's own testimony, that he was guilty of contributory negligence."

As set forth in Exception No. XI of the Bill of Exceptions. [262]

XI.

The Court erred in giving instruction number XVI to the jury as follows:

"The Court further instructs you that plaintiff, although a minor, on entering defendant's employment, assumed all the ordinary risks of such employment which he fully knew, understood, comprehended and appreciated."

As set forth in Exception No. XII of the Bill of Exceptions.

XII.

The Court erred in giving instruction number XVII to the jury as follows:

"Whether or not plaintiff was guilty of contributory negligence, or whether or not his injuries resulted from the ordinary risks of his employment, which he assumed, are also issues which the Court submits to your determination without expressing any opinion thereon."

As set forth in Exception No. XIII of the Bill of Exceptions.

XIII.

The Court erred in giving instruction number XVIII to the jury as follows.

"If the evidence fails to satisfy you that the defendant is negligent in any of the particulars alleged in the complaint, or, if you find that defendant was so negligent, but the evidence fails to satisfy you,

that said negligence was the proximate cause of plaintiff's injuries, *of*, if you believe from the evidence, that plaintiff, prior to his injuries, knew of the unsafe condition of defendant's structures and machinery, which plaintiff claims caused said injuries, if they were unsafe, and fully understood, comprehended and appreciated the dangers incident to their use, and thereafter continued in defendant's employ, or, [263] if you believe from the evidence, that plaintiff was in any way negligent and that such negligence directly contributed to his injuries, your verdict will be for the defendant.

"If, however, you believe from the evidence, that the defendant was negligent as alleged in the complaint, and that said negligence was the proximate cause of plaintiff's injuries, without contributory negligence on his part, and without knowledge by him, prior to his injuries, of the unsafe condition of defendant's structures and machinery, or full understanding, comprehension and appreciation by him of the dangers incident to their use, your verdict will be for the plaintiff."

As set forth in Exception No. XIV of the Bill of Exceptions.

XIV.

The Court erred in giving instruction number XIX to the jury as follows:

"If you find for the plaintiff, it will be your duty to assess the amount of damages he is entitled to recover, and, in estimating these damages, you may consider his age, what, before the accident, was his health and physical condition, the extent to which the

injuries he received are permanent and will affect his health and physical condition in the future, and also his bodily pain and mental anguish, if any, which he has or will proximately—that is, naturally and without the intervention of some other cause—result from said injuries, and allow plaintiff such sum for damages as in your opinion will fairly compensate him for all of said injuries.”

As set forth in Exception No. XV of the Bill of Exceptions. [264]

XV.

The Court erred in refusing to give to the jury instruction No. I requested by the defendant, as follows:

“The jury are instructed that it was the duty of the defendant in this case to use only ordinary care in furnishing to the plaintiff at and before the time of the accident complained of, a reasonably safe place and reasonably safe surroundings in which to work, and to use reasonable care in maintaining and keeping such place in a reasonably safe condition.”

As set forth in Exception No. XVI of the Bill of Exceptions.

XVI.

The Court erred in refusing to give to the jury instruction No. II, requested by the defendant, as follows:

“Negligence on the part of defendant is not presumed. It is an affirmative fact which plaintiff must prove by a preponderance of the evidence, and the negligent acts proved, if any, must be such particular acts as are alleged in the plaintiff’s complaint. The

burden of proof is on the plaintiff, and if you find that the evidence bearing on the question of negligence on the part of defendant is evenly balanced, or that it preponderates in favor of the defendant, then and in that case the plaintiff cannot recover and your verdict must be for the defendant.”

As set forth in Exception No. XVII of the Bill of Exceptions.

XVII.

The Court erred in refusing to give to the jury instruction No. III, requested by the defendant, as follows:

“The defendant was under no obligation to keep the [265] plaintiff absolutely safe and free from danger, nor to insure the plaintiff against accident. His duty, to express it tersely, was to use ordinary care to secure the plaintiff’s safety. ‘Ordinary care,’ you are instructed is the care that is ordinarily exercised by a person of average prudence under the same or similar circumstances. Just what that degree of care is or would be, is for the jury to determine. Having determined what, under the circumstances would have been ordinary care, it is for you to say whether such care was exercised by the defendant about the premises in question.”

As set forth in Exception No. XVIII of the Bill of Exceptions.

XVIII.

The Court erred in refusing to give to the jury instruction No. IV requested by the defendant, as follows:

“The jury are instructed that the defendant was

not bound as an insurer to the absolute safety and suitability of the machinery and appliances furnished by it for use in its business, and that it was not bound to furnish the very best or most improved kind of machinery to be used at its mills. It was sufficient if the appliances connected with the same were reasonably safe and suitable for the purposes for which they were used.”

As set forth in Exception No. XIX of the Bill of Exceptions.

XIX.

The Court erred in refusing to give to the jury instruction No. V requested by the defendant, as follows:

“The Court instructs you that if you believe from the evidence that the plaintiff was not using ordinary care at the time and place of his injury and that his failure to [266] use such care directly contributed to cause his injury, then you will find for the defendant, and you are instructed that ordinary care is such care as would be used by an ordinarily prudent person under the same or similar circumstances.”

As set forth in Exception No. XX of the Bill of Exceptions.

XX.

The Court erred in refusing to give to the jury instruction No. VI requested by the defendant, as follows:

“You are further instructed that if there were any latent or obscure dangers or defects connected with the machinery in and about which plaintiff worked,

that it was then the duty of the defendant to explain such latent defects or obscure dangers to the plaintiff and warn him of the dangers connected therewith. But if you shall find from the evidence that the only dangers connected with the machinery around which plaintiff was employed, were in plain view, and were not in any respect hidden, and were such dangers that the plaintiff had full knowledge of and fully comprehended and appreciated, then and in such event no obligation existed on the part of the defendant to warn plaintiff of the danger of his employment and if injured under such circumstances then plaintiff cannot recover.”

As set forth in Exception No. XXI of the Bill of Exceptions.

XXI.

The Court erred in refusing to give to the jury instruction No. VII requested by the defendant, as follows:

“The jury are further instructed that if you find from the evidence that plaintiff was a minor on the 30th day of July, 1907, at the time he received the injuries complained [267] of and you should further find, from the evidence, that the dangers, if any, to which he was exposed in working on and about the push-table and carrying-table connected with defendant’s sawmill, were not concealed, but that plaintiff had full knowledge of and fully comprehended and appreciated the dangers incident to the ordinary use of the machinery, ways, appliances and structures with, upon or about which he was required to work, and with such knowledge and understanding contin-

ued in the employment of the defendant and continued in the use of such machinery, ways, appliances and structures, then and in that event the defendant was not required to warn the plaintiff of such dangers and the plaintiff thereby assumed the risks of his employment and is not entitled to a verdict against the defendant for damages growing out of his injuries sustained by reason of the accident set forth in the complaint.”

As set forth in Exception No. XXII of the Bill of Exceptions.

XXII.

The Court erred in refusing to give to the jury instruction No. VIII requested by the defendant, as follows:

“The proximate cause of an injury in a damage case is that cause which naturally led to and which by a prudent person might reasonably have been expected to be instrumental in producing the injury complained of. In determining whether a certain act is the proximate cause of any injury, the proper test is: ‘Was the injury complained of, of such a character as might reasonably have been foreseen, or reasonably have been expected to follow as the result of such an act.’ The rule of proximate cause has the same application in a damage suit in which a minor is plaintiff, as in the case of an adult.” [268]

As set forth in Exception No. XXIII of the Bill of Exceptions.

XXIII.

The Court erred in refusing to give to the jury instruction No. IX requested by the defendant, as follows:

“The jury are instructed that in the present action plaintiff seeks to recover damages by reason of certain injuries alleged to have been sustained by him and growing out of the alleged negligence of the defendant. Negligence which will entitle plaintiff to recover, and which plaintiff must prove before he will be entitled to a verdict, consists in the failure of the defendant to do that which a person of ordinary prudence and intelligence would do under the same or similar circumstances, or in the doing of that which a person of ordinary prudence or intelligence would not have done under the same or similar circumstances, and before you will be justified in returning a verdict for the plaintiff in this case, it will be necessary for you to find, from the evidence, that the defendant in the construction and operation of the machinery, ways, appliances and structures about which plaintiff was employed had omitted to take such precautions to prevent injury to the plaintiff, as an ordinarily prudent and intelligent person would have taken under the same or similar circumstances, or that defendant had done something which an ordinarily prudent and intelligent person would not have done under the same or similar circumstances.”

As set forth in Exception No. XXIV of the Bill of Exceptions.

XXIV.

The Court erred in refusing to give to the jury instruction No. X requested by the defendant, as follows: [269]

“The jury are instructed that if the defendant did

not know as a matter of fact that plaintiff was a minor at the time of his employment, or that the defendant was not in possession of facts and circumstances, from which it should have known that the plaintiff was a minor, then no greater obligation rested upon the defendant to warn the plaintiff of dangers that were apparent and were not concealed or hidden than there would have been to warn a man who had reached his majority. In taking into consideration the age of the plaintiff defendant had a right to rely upon the conduct and demeanor of the plaintiff, his size, appearance and ability to do a man's work."

As set forth in Exception No. XXV of the Bill of Exceptions.

XXV.

The Court erred in refusing to give to the jury instruction No. XI requested by the defendant, as follows:

"The jury are hereby instructed that if they shall find from the evidence that plaintiff had knowledge of the fact that there were two ways by means of which he could have climbed upon the push-table—the one way being to step over the spiked roller and the other way being to climb over the side of the push-table, by means of the lumber buggies; the first way being extremely dangerous and so known to him to be, and the other way safe and known by him to be so. And if you shall believe from the evidence that he voluntarily chose the dangerous way of going upon said push-table, when there was no occasion or necessity for so doing, and in so doing received the

injury of which he complains, that he cannot hold the defendant responsible for an injury which directly resulted from his voluntary and unnecessary choice of the more dangerous of the two ways of doing the work he [270] attempted to do.”

As set forth in Exception No. XXVI of the Bill of Exceptions.

XXVI.

The Court erred in refusing to give to the jury instruction No. XII requested by the defendant, as follows:

“The law requires of a minor suing for personal injuries, care and prudence equal to his capacity, and if you find from the evidence that the plaintiff in this action knew of the character of the machine which caused his injury and was aware of its dangerous character and carelessly and negligently tried to step over the spiked roller on to the push-table, so that his injury occurred or was inflicted without fault on the part of the defendant, then your judgment will be in favor of the defendant.”

As set forth in Exception No. XXVII of the Bill of Exceptions.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,

Attorneys for Defendant.

And upon the foregoing assignment of errors and upon the record in said cause, the defendant prays that said verdict and judgment may be reversed.

Dated February 24, 1914.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,

Attorneys for Defendant.

[Endorsed]: C. C. No. 1478. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, vs. Benson Lumber Company, Defendant. Assignment of Errors. Filed Feb. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, [271] Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attys. for Defendant. [272]

In the District Court of the United States, for the Southern District of California, Southern Division.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Petition for Writ of Error and Supersedeas.

Defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 18th day of September, 1913, comes now by Gibson, Dunn & Crutcher and Wright & Winnek, its attorneys, and files herewith an assignment of error and petitions said Court to allow said defendant to procure a writ of error to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit, under and according to

the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which this defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,

Attorneys for Petitioner.

[Endorsed]: C. C. No. 1478. In the District Court of the [273] United States, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, vs. Benson Lumber Company, Defendant. Petition for Writ of Error and *Supersedeas*. Filed Feb. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attys. for Defendant. [274]

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs. :

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

Upon motion of Gibson, Dunn & Crutcher, and Wright & Winnek, attorneys for defendant, and upon filing a petition for writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Circuit Court of Appeals for the Ninth Circuit the verdict and judgment heretofore entered herein.

OLIN WELLBORN,

Judge.

[Endorsed]: C. C. No. 1478. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, vs. Benson Lumber Company, Defendant. Order Allowing Writ of Error. Filed Feb. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attys. for Defendant. [275]

In the District Court of the United States for the Southern District of California, Southern Division.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Benson Lumber Company, a corporation, as principal, and the Aetna Accident & Liability Company, a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, duly authorized to execute bonds and undertakings and *supersedeas* bonds in the Federal Courts upon Writ of Error, are held and firmly bound unto H. C. McCann, in the sum of Sixteen Thousand One Hundred and Seventy-six and 44/100 Dollars, to be paid to the said H. C. McCann, plaintiff above named, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 18th day of February, 1914.

AND, WHEREAS, the above-named defendant, Benson Lumber Company, has sued out a writ of error to the United States Circuit Court of Appeals, Ninth Circuit, to reverse a judgment in the above-entitled cause by the District Court of the United States for the Southern District of California, Southern Division, rendered in said cause on September 16th, 1913, and entered therein on September 18th, 1913. [276]

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant, Benson Lumber Company, shall prosecute said writ

to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

BENSON LUMBER COMPANY,

By J. CAMPBELL BLACK,

Manager.

AETNA ACCIDENT & LIABILITY COM-
PANY,

By C. S. VAN BRUNDT,

[Corporate Seal] Resident Vice-president.

By R. H. GARRISON,

Resident Assistant Secretary.

Affidavit.

State of California,

County of Los Angeles,—ss.

Personally appeared before me, C. S. Van Brundt, on the 18th day of February, one thousand nine hundred and fourteen, known to me to be the Resident Vice-president of The Aetna Accident and Liability Company, a corporation described in and which executed the annexed Bond of Benson Lumber Company, as surety thereon, and who, being duly sworn, deposes and says that he resides at Los Angeles, in the State of California; that he is the said Resident Vice-president of The Aetna Accident and Liability Company, and knows the corporate seal thereof; that the said company is duly and legally incorporated under the laws of the State of Connecticut, and duly licensed to transact its business in the State of California. That the

seal affixed to the annexed Bond of Benson Lumber Company, is the corporate seal of The Aetna Accident and Liability Company, and thereto affixed by order and authority of the Executive Committee of said company; and that he signed his name thereto by like order and authority as Resident Vice-president of said company; and that he is acquainted with R. H. Garrison, and knows him to be the Resident Assistant [277] Secretary of said company; and that the signature of said R. H. Garrison, subscribed to the said Bond is in the genuine handwriting of said R. H. Garrison, and was thereto subscribed in the presence of said deponent.

Sworn to, acknowledged before me, and subscribed in my presence this 18th day of February, 1914.

[Seal]

FLORENCE W. SAUNDERS,

Notary Public in and for the County of Los Angeles, State of California.

The foregoing bond, executed by the Benson Lumber Company as principal, but without the seal of said company attached thereto, and by the Aetna Accident & Liability Company, as surety, is acceptable to plaintiff both in substance and in form and may be filed and approved as a bond on writ of error out of the United States Circuit Court of Appeals for the Ninth Circuit.

HUNSAKER & BRITT and
HAINES & HAINES,

Attorneys for Plaintiff.

The within bond approved this 24th day of February, 1914.

OLIN WELLBORN,
District Judge. [278]

THE AETNA ACCIDENT AND LIABILITY
COMPANY,
HARTFORD, CONNECTICUT.

Certificate of Authority of Resident Vice-president.

KNOW ALL MEN BY THESE PRESENTS,
That C. S. Van Brundt has been and is hereby appointed Resident Vice-president of The Aetna Accident and Liability Company, of Hartford, Connecticut, at Los Angeles, California, and as such Resident Vice-president has full power and authority to sign and execute, on behalf of The Aetna Accident and Liability Company, any and all bonds and undertakings and all bonds and undertakings signed by him, when sealed and attested by a Resident Assistant Secretary, shall be as valid and binding upon the Company as if said bonds and undertakings had been signed by the President and duly sealed and attested.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of The Aetna Accident and Liability Company at a meeting duly called and held on the 28th day of December, 1911.

ARTICLE 8, RESIDENT OFFICERS, ATTORNEYS-IN-FACT AND AGENTS.

Section 1. The President, any Vice-president or the Secretary may from time to time appoint

Resident Vice-presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company and either the President, and Vice-president, the Secretary or the Board of Directors may at any time remove any such Resident Vice-president, Resident Assistant Secretary, Attorney-in-Fact or Agent, and revoke the power and authority given him.

Section 2. Resident Vice-presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, [279] and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

IN WITNESS WHEREOF, The Aetna Accident and Liability Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 7th day of January, A. D. 1914.

THE AETNA ACCIDENT AND LIABILITY COMPANY,

[Corporate Seal]

By J. S. ROWE,
Secretary.

Attest: DANIEL N. GILL (?)

Assistant Secretary.

State of Connecticut,
County of Hartford,—ss.

On this 7th day of January, A. D. 1914, before

me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say: That he resides in the city of Hartford, State of Connecticut; that he is the Secretary of The Aetna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Notarial Seal]

JAMES F. McEVITT,

Notary Public.

My commission expires Jan. 31, 1914. [280]

THE AETNA ACCIDENT AND LIABILITY
COMPANY,
HARTFORD, CONNECTICUT.

Certificate of Authority of Resident Assistant Secretary.

KNOW ALL MEN BY THESE PRESENTS,
That R. H. Garrison, has been and is hereby appointed Resident Assistant Secretary of The Aetna Accident and Liability Company, of Hartford, Connecticut, at Los Angeles, California, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-president, shall be as valid and binding upon the Company as if said

bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-law adopted by the Board of Directors of The Aetna Accident and Liability Company, at a meeting duly called and held on the 28th day of December, 1911.

ARTICLE 8. RESIDENT OFFICERS, ATTORNEYS-IN-FACT AND AGENTS.

Section 1. The President, and Vice-president or the Secretary may from time to time appoint Resident Vice-presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-president, the Secretary or the Board of Directors may at any time remove any such Resident Vice-president, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory [281] in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-president.

IN WITNESS WHEREOF, The Aetna Accident and Liability Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 7th day of January, A. D. 1914.

THE AETNA ACCIDENT AND LIABILITY COMPANY,

[Corporate Seal]

By J. S. ROWE,
Secretary.

Attest: DANIEL GILL (?)
Assistant Secretary.

State of Connecticut,
County of Hartford,—ss.

On this 7th day of January, A. D. 1914, before me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say: That he resides in the city of Hartford, State of Connecticut; that he is the Secretary of The Aetna Accident and Liability Company, the Corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Notarial Seal]

JAMES F. McEVITT,
Notary Public.

My commission expires Jan. 31, 1914. [282]

[Endorsed]: C. C. No. 1478. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff,

vs. Benson Lumber Company, a Corporation, Defendant. Bond on Writ of Error. Filed Feb. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendant. [283]

ORIGINAL.

In the District Court of the United States for the Southern District of California, Southern Division.

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Praeipice for Record on Writ of Error.

To the Clerk of Said District Court:

You are hereby instructed to include in the record on writ of error in the above-entitled cause the following:

1. Writ of error.
2. Citation on writ of error and acknowledgment of service.
3. Petition for removal.
4. Bond on removal.
5. Original complaint.
6. Demurrer to original complaint.

7. Second amended complaint.
8. Answer to second amended complaint.
9. Verdict.
10. Judgment-roll and certificate thereto.
11. Bill of exceptions and order allowing same.
12. Stipulation filed on Nov. 20, 1913, making model of mill used as exhibit in this case part of transcript of record on writ of error.
13. Petition for writ of error and *supersedeas*.
14. Assignment of errors.
15. Order allowing writ of error and *supersedeas*.
16. Bond on writ of error. [284]

Dated, March 5th, 1914.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,

Attorneys for Plaintiff in Error.

[Endorsed]: C. C. No. 1478. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, etc., Defendant in Error, vs. Benson Lumber Company, Plaintiff in Error, Defendant. Praecipe for Record on Writ of Error. Filed Mar. 5, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., for Plaintiff in Error. [285]

ORIGINAL.

*In the District Court of the United States for the
Southern District of California, Southern Divi-
sion.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

**Stipulation [for Transmission of Certification and
Transmission of Exhibit III to Appellate Court.]**

WHEREAS, the parties to the action above-entitled have heretofore entered into a stipulation in words and figures, as follows:

“It is hereby stipulated that the model of a portion of the mill where plaintiff was hurt, which was used in evidence by both sides, for the purpose of illustration, may be considered as attached to the original Bill of Exceptions, as Exhibit No. III, without being physically attached thereto, and that if the defendant sues out and obtains a Writ of Error in the above-entitled action, that the clerk of the said District Court of the United States for the Southern District of California, Southern Division, may attach the said model to the original printed transcript of the record and cause the said model to be filed with the said original trans-

cript of record in the United States Circuit Court of Appeals for the Ninth Circuit.”

And, WHEREAS, the parties to the action above entitled have been advised by the clerk of said Court that owing to the size of said model it is impracticable to attach it or attempt to attach it to the original record to be transmitted by said Clerk to the United States Circuit Court of Appeals for the Ninth [286] Circuit;

NOW, THEREFORE, it is stipulated by and between the parties hereto that when the clerk in the above-entitled court transmits the original record to the United States Circuit Court of Appeals for the Ninth Circuit, he may also transmit to the Clerk of said Circuit Court of Appeals the model used in the trial of said action, and that said model need not be physically attached to the record, and that it shall be identified by a certificate of the clerk in the above-entitled District Court that it was the model used at the trial of the above-entitled action and that when so transmitted with such certificate and received by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, shall be considered as a part of the record in such Circuit Court of Appeals the same as though physically attached to the Bill of Exceptions.

HUNSAKER & BRITT,

HAINES & HAINES,

Attorneys for Plaintiff.

WRIGHT & WINNEK,

GIBSON, DUNN & CRUTCHER,

Attorneys for Defendant.

[Endorsed]: No. 1478. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, etc., Plaintiff, vs. Benson Lumber Company, Defendant. Stipulation for Transmission of Model of Mill as Exhibit. Filed Apr. 16, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., for Defendant. [287]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States in and for the Southern District of California, Southern Division.

C. C. No. 1478.

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing two hundred and eighty-seven (287) typewritten pages, numbered from 1 to 287 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Judgment-roll, Stipu-

lation of November 20, 1913, Bill of Exceptions (including Exhibits I and II), Assignment of Errors, Petition for Writ of Error and *Supersedeas*, Order Allowing Writ of Error, Bond on Writ of Error, Praecipe for Transcript and Stipulation for Transmission of Model of Mill as Exhibit filed April 16, 1914, in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the Praecipe filed in my office on behalf of the plaintiff in error by its attorneys of record, except Exhibit III, being said model of mill, which is separately transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the said Stipulation of counsel for the respective parties filed April 16, 1914.

I do further certify that the cost of the foregoing [288] record is \$162.45, the amount whereof has been paid me by the Benson Lumber Company, the plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 17th day of April, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence, the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [289]

[Endorsed]: No. 2410. United States Circuit Court of Appeals for the Ninth Circuit. Benson Lumber Company, a Corporation, Plaintiff in Error, vs. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed April 21, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Benson Lumber Company, a corporation,

Plaintiff in Error,

vs.

H. C. McCann, by Jesse F. McCann, his Guardian ad Litem,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Filed

OCT 7 - 1914

F. D. Mouckton,
Clerk.

GIBSON, DUNN & CRUTCHER,
By NORMAN S. STERRY;
WRIGHT & WINNEK,
By LEROY WRIGHT,
Attorneys for Plaintiff in Error.

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by which the Defendant in Error could
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United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Benson Lumber Company, a corporation,

Plaintiff in Error,

vs.

H. C. McCann, by Jesse F. McCann, his Guardian ad Litem,

Defendant in Error.

BRIEF.

STATEMENT OF THE CASE.

The above action was originally brought in the Superior Court of the state of California, in and for the county of San Diego, by the defendant in error as plaintiff, against the plaintiff in error, as defendant. Because of the diverse citizenship of the parties, the cause was removed to the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California. The suit was to recover for personal injuries sustained by the defendant in error, on or about the 30th day of July, 1907, while employed in the saw mill of the plaintiff in error.

The cause was tried upon the second amended complaint and an amended answer and an amendment to said answer. The second amended complaint is to be found in transcript of record, pp. 43 to 51, and the answer thereto on pp. 68 to 82.

In brief, the defendant in error alleged that at the time of the accident he was seventeen years of age and was employed in the mill of the plaintiff in error, loading lumber; that the said lumber was carried from a trimmer onto a carrying table and also a push table; that it was part of the duty of the defendant in error, whenever there was a jam of lumber to go upon the push table and clear away the jam, that the only means provided by the plaintiff in error for going upon the push table was over a dog roller; that the said place at which the defendant in error was required to work was dangerous, defective and unsafe; that the way to the push table over the dog roller was dangerous and unsafe; that there were not sufficient skids furnished and that lumber, therefore, become clogged and necessitated the defendant in error going upon the push table; that the defendant in error, through his youth and lack of experience, did not understand or appreciate the danger to which he was exposed, and that the plaintiff in error negligently failed to warn him thereof; the amended answer of the plaintiff in error, in the main, admitted the construction of the mill as described in the second amended complaint, but traversed all of the allegations of negligence; denied that the defendant in error was required or expected to go upon the push table, or that

the only means of going there was over the dog roller, and alleged that other, better and safer means were provided by the plaintiff in error for its employees to mount the push table, when it was necessary so to do.

In addition to the denials, of the answer, it was affirmatively alleged that the defendant in error contributed to his injuries by his own want of ordinary care and caution, and further that if any person other than the defendant in error was negligent, the negligence was that of a fellow servant and employee, and that the defendant in error was injured as the result of an open, apparent and obvious risk, and that prior to his receiving said injuries the defendant in error knew, or by the exercise of ordinary care upon his part, should have known of the dangers incident to his work, and that he assumed the risk of his injury.

Upon the issues thus formed, a trial was had by a jury which resulted in a verdict in favor of the defendant in error for eight thousand dollars and costs.

At the trial of the cause, there was introduced and used by both sides, a model of the portion of the mill where the accident occurred. [Transcript of Record, p. 94.] This model was drawn to the scale of one inch to the foot. [Trans. of Record, p. 174.] Owing to the size of the model, it was found physically impossible to attach the same to the original bill of exceptions. By stipulation of the parties the model was sent by the clerk of the District Court to the clerk of this Honorable Court, under the certificate of the said clerk of the District Court that the same was the model used at the

trial of said cause. [Trans. of Record, pp. 89, 296 and 297.] We feel certain that an examination of this model will materially assist the court in understanding the physical conditions of the mill at the time of the accident and our statement and discussion of the cause. In addition to the exhibit, the defendant in error, as a part of his case, introduced as defendant's in error Exhibit No. I, a diagram prepared by himself, of the portion of the mill where he was hurt; and as Exhibit No. II, a photograph of the same portion. [Trans. of Record, pp. 262-263.] For the convenience of the court, we here attach a copy of the drawing and of the photograph. The lettering on the original sketch is very plain, but is somewhat dim on the photograph, and we have taken the liberty of etching the letters, on the copies here attached, so as to make them perfectly plain, but their position is the same as on the originals.

CC 1815

H. C. McBurn etc

Benjamin Franklin, Pa

Plant 450 Albers 1 for 1000 ft. in 100

Plant 450 Albers 1

11th September 12, 1712

The W. Vardick 6 lbs

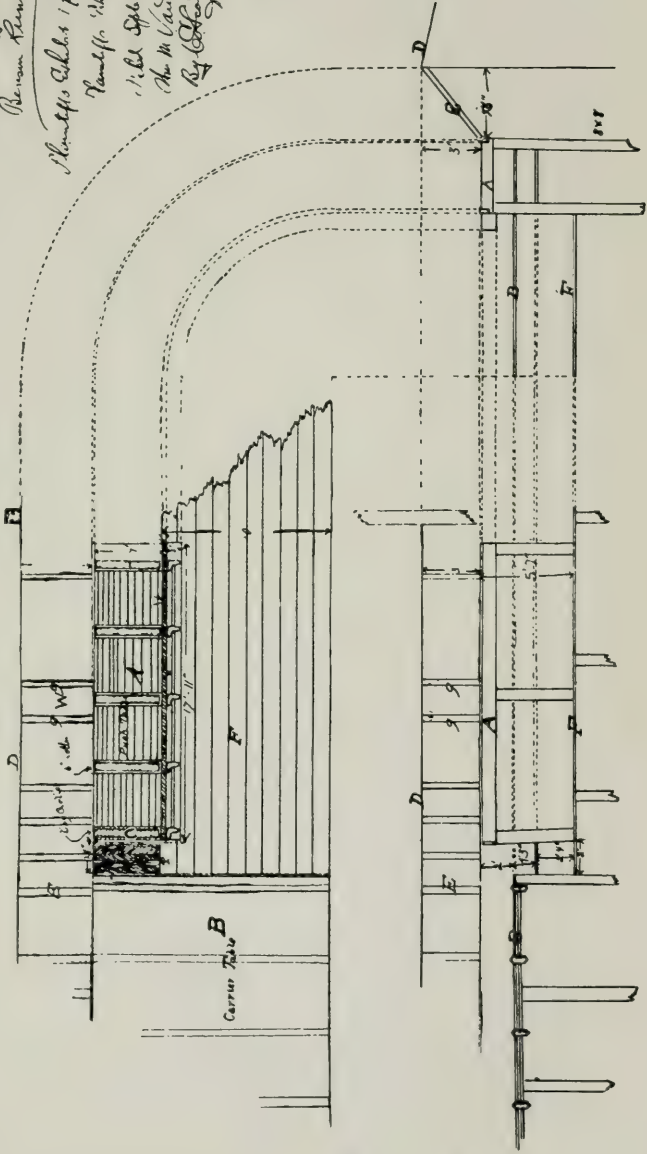
By Albers 1

Expiry 6 lbs

North

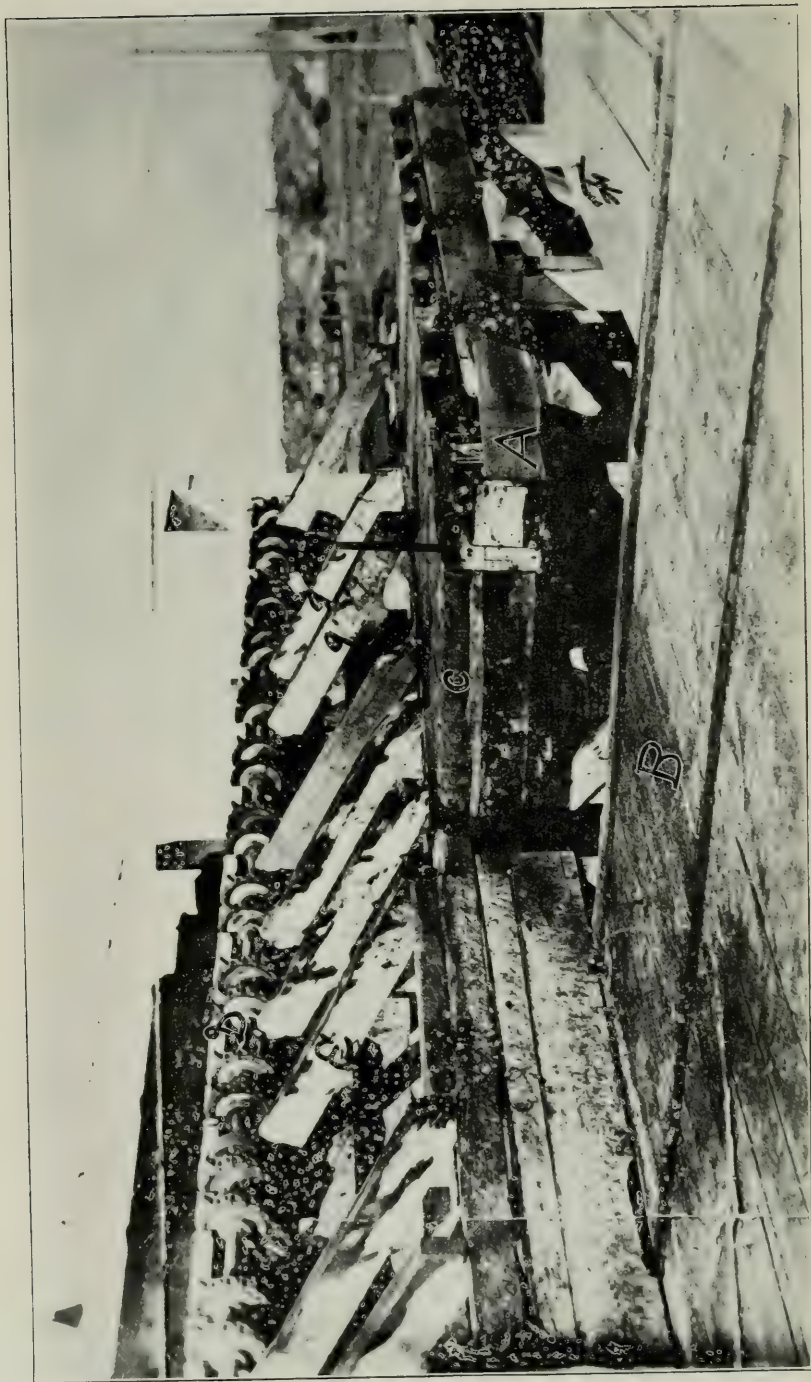
West

71. 1000



South

East



At the time of the accident the plaintiff in error was engaged in sawing lumber. After the lumber was cut in appropriate lengths it was passed from the trimmer over the gears marked "D" down the skids which are shown both in the photograph and the diagram, and marked "G." The lumber was supposed to strike the carrying-table, which is marked "B." Through this carrying-table there were endless chains or bands of steel which were kept constantly in motion and which carried the lumber forward. A portion of the lumber would fall upon the push-table. There were a number of iron rollers in the push-table and at the southerly end, or the end next to the carrying-table, was a dog-roller which was the same as the rollers in the push-table, except it was armed with a series of teeth or spikes which were about one inch or one and a quarter in length. These rollers revolved at the rate of one hundred to one hundred and fifty revolutions a minute, their object being to propel any lumber that fell upon the push-table over onto the carrying-table. The table marked "F" was considerably below the carrying-table and on it the men stood who loaded the lumber, one of which was the defendant in error. It was their duty when the lumber reached them to remove it from the carrying-table and pile it upon the carts.

The mill was first constructed without any push or carrying-tables, the lumber being sent from the trimmer over skids to the ground. The defendant in error had been employed a week or two before these tables were constructed and then had been laid off for a week or ten days while the carrying-table and push-table were erected. After they had been in operation he had

worked about two weeks before the accident. The testimony at the trial showed that after the accident there were several changes made in the construction of both tables. The carrying-table was lowered and lengthened. At the time of the accident in front of the dog-roller was a board which is marked upon the model as "X," and is referred to throughout the testimony as the "X board." It is not shown in the photograph for the reason that it had been removed before the picture was taken. The defendant in error offered testimony showing that the "X board" was removed the day after the accident on order of the superintendent. The testimony of the plaintiff in error tended to show that after the accident the board was broken by some lumber striking it and was removed on that account. Whatever was the cause of the removal of the board, the record clearly shows that at the time of the accident the board was in front of the roller and extended to about an inch of its top. This was doubtless put there to keep the clothes of the workmen from being caught in the revolving teeth of the roller. Between the loading-table, which is marked "F," and the push and carrying-tables, was another little platform, or step, which does not show in the photograph, but which is shown on the plat and marked "P." The push-table was two feet higher than the carrying-table, and the distance over the dog-roller was one foot and nine inches. [Trans. of Record, p. 152.]

When the defendant in error first entered the mill he undertook to study the machinery and become familiar with it, and as part of his case in chief he gave an

accurate and detailed account of the operation of the whole mill.

There was nothing obscure about any of the machinery where he was injured. All of the rollers in the push-table, including the dog-roller, the gears on the trimmer and the endless bands in the carrying-table were open and apparent to anyone.

When the mill was in operation great quantities of lumber came over the trimmer onto the push and carrying-tables and the work of the men in handling this lumber was very strenuous; also, there was so much noise made by the machinery that the man who operated the trimmer could not hear any verbal directions from the men who were on the loading-table, but they could, and frequently did, stop the operation of the mill by giving him some signal with the hand or arm.

The defendant in error, at the time of the accident, was seventeen years of age, but he was man grown, weighing about one hundred and forty pounds; was the most active of all of the men in his gang and the testimony of both sides shows that he performed as much, if not more, labor than any of the other workmen. There is not a suggestion in the record that at the time of his employment any officer or agent of the plaintiff in error knew, or had any reason to suppose, that he was a minor.

During the work it would often occur that there would be a jam or, as one of the witnesses expressed it, a glut of lumber upon the push-table. Often a piece of lumber would fall between the skids and so block the progress of other lumber. It was necessary, when this

condition arose, to remove the cause of the jam. The defendant in error had been furnished with a pickaroon, which was a sharp hook on a long pole, but he did not like the one furnished and had made one for himself with a longer handle. The accident happened shortly after two o'clock in the afternoon. The defendant in error had used his pickaroon in the morning, but on returning from lunch had not seen it and was unable to state where it was.

He testified in his own behalf that soon after the push and carrying-tables had been first installed, that Mr. Kilty, the foreman, had seen a jam of lumber upon the push-table and had ordered him (defendant in error) to go upon the table and clear it off and that in the presence of Mr. Kilty he had mounted on the push-table by going upon the carrying-table and then stepping from the carrying-table across the dog-roller and that thereafter whenever a jam or glut of lumber occurred he had generally gone upon the push-table in that manner; that he had gone on the push-table over the dog roller once or twice before the time Kilty had ordered him to go upon the push-table [Trans. of Record, p. 126], and that he had gone upon it many times without accident or injury; that when going upon it he had seen and knew that lumber was coming upon it in a continuous stream and that he knew the dog-roller and the other rollers in the push-table were revolving and that the endless steel bands in the carrying-table were in motion. He further testified that he had always been able to step across the dog-roller with safety prior to the time of his injury; that he had occasionally seen other workmen go onto the push-table over the dog-

roller; that as a general rule there were lumber buggies piled with lumber standing alongside of the loading-table; that a workman on the loading-table could mount to the push-table with safety on one of these lumber buggies without stepping over the dog-roller; that at the time of the accident there was a lumber buggy there but that he did not try to go up on it for the reason that he had the impression that it was either piled too high or too low with lumber [Trans. of Record, pp. 145-146], that the most convenient way was to step over the dog-roller when the machinery was running; that he knew that in doing so he had to watch out to prevent being struck by lumber [Trans. of Record, p. 142]; that he did not know exactly why he did not go on the table by way of the trucks on the day of the injury. [Trans. of Record, p. 145.]

Again looking at the photograph, marked Plaintiff's Exhibit No. II, it will be seen that there is an iron pipe or stem at the southeast corner of the push-table. The defendant in error was not certain whether he could have taken hold of that and climbed up that way onto the push-table or not.

On behalf of the plaintiff in error, Mr. Kilty, its foreman, testified that he had never seen the defendant in error, or any other person, stepping over the dog-roller; that one day he saw the defendant in error up on the push-table and that he called him down immediately; that he often told him to come down and to stay on the loading-table; that men who were loading lumber were not expected or required to go upon the push-table and that he had never ordered the defendant in

error to go there; that the Benson Lumber Company's mill was an Allison mill plan and that the loading and push-tables were the type used in that style of mill; that he had not told the defendant in error to watch out against being hurt by a revolving shaft because he would consider it an insult to tell anyone to watch out for such an open danger.

Mr. Coffin, who was a fellow employee of the defendant in error at the time of the accident, also testified that he had warned him about getting upon the carrying-table and had told the defendant in error that he would get hurt there; that he (Coffin) had never seen the defendant in error, or anyone else, get on the push-table over the dog-roller.

Mr. Kilty also testified that no matter how high the lumber buggies were loaded, the defendant in error, or other workmen, could safely go over them to the push-table providing the buggies were properly loaded.

The defendant in error denied having been warned either by Coffin to stay off the carrying-table, or by Kilty to keep off the push-table.

At the time of the accident the plaintiff and one Mr. Coffin were working side by side on the loading-table. A board, in coming from the trimmer, fell between the skids and would have caused a jam of lumber if it had not been removed. Coffin saw this and started to signal the trimmer to stop the machinery. Before he could do so the defendant in error sprang to the carrying-table and attempted to step across the dog-roller onto the push-table; in doing so his foot was caught in some way between the "X board" and the dog-roller and was

so badly crushed that it had to be amputated. The witness Coffin was under the impression that a piece of timber struck his foot, but this was only an impression. The defendant in error did not know how his foot came to be caught, being unable to state whether he missed his footing or whether his foot slipped as he was stepping over the roller. He did testify, however, that there was no lumber coming onto either table at the time he attempted to cross over the dog-roller, and he admitted that he started towards the push-table as soon as he saw the board drop between the skids; that he did not tell anyone of his intention and made no attempt to have the machinery stopped, did not speak to anyone and was not asked to go upon the push-table.

We believe the foregoing to be a fair outline of the evidence.

Both sides having rested, the plaintiff in error (defendant below) moved the Honorable District Court to direct the jury to return a verdict in favor of the defendant. (The reasons for the said motion are set forth in full in specification of errors No. 1, *post*, pages 18 and 19.)

This motion was denied, the learned court submitting to the jury the question of negligence of the plaintiff in error and of the defendant in error, and also whether the defendant in error assumed the risk of his injury.

Questions Raised by the Writ of Error.

In the assignment of errors filed in the record, pages 265 to 282, there are twenty-six separate assignments of error. We believe each well taken, but to discuss all would unnecessarily prolong the brief; also, a number of errors can be discussed together instead of under separate heads. The questions, therefore, to which we shall now confine ourselves are:

I.

Did the learned District Court err in denying the motion of the plaintiff in error for directed verdict?

(a) Did the defendant in error, as a matter of law, assume the risk of his injury?

(b) As a matter of law, was the defendant in error guilty of contributory negligence?

II.

Did the court err in giving the jury, on its own motion, instruction No. V, wherein the court charged the jury that a servant did not assume a risk arising from the negligence of the employer in not providing or maintaining a safe place in which to work?

III.

Did the court err in giving to the jury, on its own motion, instructions numbered VI and VII, where the court told the jury that in order for the defendant in error to assume the risk of his injury he must have actual knowledge of the danger incident to his work, and eliminated entirely the question of whether the defendant in error should have known of the danger by the exercise of ordinary care; further, by instruction

No. VII, charged the jury that the negligence of the plaintiff in error could be determined by reference to whether the defendant in error understood the danger of his situation.

IV.

Did the court err in refusing instruction No. VI, requested by the plaintiff in error, to the effect that it was not required to instruct the defendant in error as to any open and apparent dangers, and did the court further err in giving, on its own motion, instruction No. VIII wherein the jury were told that if the defendant in error did not fully appreciate the danger incident to his work that it was the duty of his employer to fully explain and warn him thereof (although the evidence showed that the dangers were perfectly apparent, open and obvious and that no reasonable man could have expected or assumed that the defendant in error did not fully appreciate and understand the dangers)?

V.

Did the court err in refusing to give instruction No. VIII, requested by the plaintiff in error, to the effect that the proximate cause of an injury is that cause which could have been reasonably foreseen as liable to produce an injury?

VI.

Did the court err in refusing to give instruction No. XI, requested by the plaintiff in error, to the effect that if there were two ways for the defendant in error to reach the push-table, one safe and the other dangerous, and the defendant in error voluntarily chose the dangerous way he could not recover?

SPECIFICATION OF ERRORS.

I.

The court erred in denying the motion of the defendant (plaintiff in error here) to direct the jury to return a verdict in favor of said defendant, as set forth in exception No. II [pp. 230-231, bill of exceptions], which said motion was as follows:

“Both sides having rested, the defendant then and there moved the said court to direct the jury to return a verdict in favor of the said defendant upon the following grounds:

“1. There was no evidence proving or tending to prove any negligence on the part of the defendant.

“2. There was no evidence proving or tending to prove that negligence, if any, upon the part of the defendant contributed directly or proximately, or at all, to the injuries sustained by the plaintiff.

“3. That it affirmatively appeared from the evidence that the plaintiff himself was guilty of negligence, that is that said plaintiff did not exercise ordinary care or caution for his own safety and protection, and that the failure upon the part of the plaintiff to exercise ordinary care and caution for his own safety and protection contributed directly and proximately to the injuries sustained by him.

“4. It affirmatively appeared from the evidence that the injuries sustained by plaintiff were the result of a risk assumed by him in the usual course of his employment; that the dog or spike-roller was open, apparent and obvious and the danger of attempting to climb to the push-table or go to the push-table across said roller

was an open and obvious risk of which plaintiff fully knew, comprehended and understood and appreciated, or should have, by the exercise of ordinary care on his part, have fully known, comprehended and understood and appreciated. Plaintiff was not injured by reason of any concealed or latent danger but was injured as a result of a danger which was open and obvious and of which plaintiff fully knew and realized, comprehended and understood, or of which he should have fully known, realized, comprehended and understood had he exercised ordinary care for his own safety and protection.”

II.

The court erred in giving instruction No. V to the jury as follows:

“The court instructs you, that an employer is not to be held as guaranteeing or insuring the absolute safety of the employee, or the place in which he is to work, but it is the duty of the employer to exercise reasonable care in providing and maintaining a safe place for the employee to work and sufficient and safe material, appliances and other means, by which the service is to be performed. Furthermore, this duty of the employer to exercise reasonable care for the employee cannot be delegated to a servant so as to exempt the former from liability for injuries caused to another servant by its omission. The servant does not undertake to incur the risk arising from negligence in providing or maintaining a safe place in which he is to work, or suitable and safe appliances, or other means with which his service is to be performed. His contract implies that, in regard

to these matters, his employer will exercise reasonable care in making adequate provision that no danger shall ensue to him, and he has a right to assume and rely and act upon the assumption, that such care has been exercised.”

As set forth in exception No. IV of the bill of exceptions, on pp. 233-236, Trans. of Record.

III.

The court erred in giving instruction No. VI to the jury as follows:

“The court further instructs you, that, if the place where plaintiff was working and the machinery with which he worked at the time of the accident were unsafe, as alleged in the complaint, but plaintiff knew them to be unsafe, and fully understood, comprehended and appreciated the dangers incident to their use, then defendant would not be chargeable with negligence in assigning him to the work in which he was engaged when injured.”

As set forth in exception No. V of the bill of exceptions, on pp. 263 and 267, Trans. of Record.

IV.

The court erred in giving instruction No. VII to the jury as follows:

“The court further instructs you, that, at the time plaintiff was injured, there was in force a statute of California which contains the following provision:

“ ‘Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer, shall

not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and therefore consented to use the same or continued in the use thereof.'

"This statute applies to the consideration by you of the entire evidence in its bearing upon the allegations of the complaint charging the defendant with negligence, and the allegations of the answer denying the negligence so charged and charging the plaintiff with negligence, and with having assumed the risk incident to the business and work in which he was employed and with having contributed to his alleged injury by his own concurring negligence."

As set forth in exception No. VI of the bill of exceptions, on pp. 237-238, Trans. of Record.

V.

The court erred in giving instruction No. VIII to the jury as follows:

"The court further instructs you, that, in passing upon the question whether plaintiff did fully understand, comprehend and appreciate the dangers incident to the place where and the machinery with which he was working, it is proper for you to consider, with all the other evidence, the evidence as to the age, experience, and maturity of judgment of the plaintiff at the time the injury was received.

"Where a master employs a servant to do dangerous work, or to do work that must necessarily require him

to move in and about moving machinery of a dangerous nature, who, from youth, inexperience, ignorance or want of capacity may fail to appreciate the danger surrounding him by such work, and the master knows, or by the exercise of ordinary care, could know, of the servant's failure to appreciate the danger incident to his work, it is a breach of duty for the master to expose such servant, even with his own consent, to such danger, or to place him in a position where it shall become necessary for him to encounter the same, without first giving him such full and complete instructions as will enable him to fully and completely comprehend them and to do the work safely and with proper care on the servant's part."

As set forth in exception No. VII of the bill of exceptions, pp. 238-239, Trans. of Record.

VI.

The court erred in refusing to give to the jury instruction No. VI requested by the defendant, as follows:

"You are further instructed that if there were any latent or obscure dangers or defects connected with the machinery in and about which plaintiff worked, that it was then the duty of the defendant to explain such latent defects or obscure dangers to the plaintiff and warn him of the dangers connected therewith. But if you shall find from the evidence that the only dangers connected with the machinery around which plaintiff was employed, were in plain view, and were not in any respect hidden, and were such dangers that the plaintiff had full knowledge of and fully comprehended and

appreciated, then and in such event no obligation existed on the part of the defendant to warn plaintiff of the danger of his employment and if injured under such circumstances then plaintiff cannot recover.”

As set forth in exception No. XXI of the bill of exceptions, pp. 254-255.

VII.

The court erred in refusing to give to the jury instruction No. VIII requested by the defendant, as follows:

“The proximate cause of an injury in a damage case is that cause which naturally led to and which by a prudent person might reasonably have been expected to be instrumental in producing the injury complained of. In determining whether a certain act is the proximate cause of any injury, the proper test is: ‘Was the injury complained of, of such a character as might reasonably have been foreseen, or reasonably have been expected to follow as the result of such an act.’ The rule of proximate cause has the same application in a damage suit in which a minor is plaintiff, as in the case of an adult.”

As set forth in exception No. XXIII of the bill of exceptions, p. 256.

VIII.

The court erred in refusing to give to the jury instruction No. XI requested by the defendant, as follows:

“The jury are hereby instructed that if they shall find from the evidence that plaintiff had knowledge of

the fact that there were two ways by means of which he could have climbed upon the push-table—the one way being to step over the spiked-roller and the other way being to climb over the side of the push-table, by means of the lumber buggies; the first way being extremely dangerous and so known to him to be, and the other way safe and known by him to be so. And if you shall believe from the evidence that he voluntarily chose the dangerous way of going upon said push-table, when there was no occasion or necessity for so doing, and in so doing received the injury of which he complains, that he cannot hold the defendant responsible for an injury which directly resulted from his voluntary and unnecessary choice of the more dangerous of the two ways of doing the work he attempted to do.”

As set forth in exception No. XXVI of the bill of exceptions, pp. 258-259.

ARGUMENT.

I.

The Court Erred in Denying the Motion of the Plaintiff in Error to Direct a Verdict Against the Defendant in Error and in Favor of the Plaintiff in Error.

The refusal to direct a verdict in favor of the plaintiff in error is the first specification of error herein (see pp. 18-19, *ante*), and is the first assigned error in the assignment of errors. [Trans. of Record, pp. 265-267.]

We feel that it is a very debatable question whether there was any evidence to warrant the implied finding of the jury that the plaintiff in error was guilty of negligence. We do not discuss that issue, however, for the reason that we believe that it is clear, beyond a peradventure of a doubt, that the evidence most favorable to the defendant in error shows that he assumed the risk of his injury and that he contributed to his injury by his own negligence. If either proposition can be established, as a matter of law, the court erred in not directing a verdict in favor of the plaintiff in error.

Although the defenses of assumed risk and contributory negligence are often spoken of as synonymous, and the evidence which establishes one, frequently establishes the other, still, they are separate, distinct defenses.

Assumption of risk is said to be a matter of contract. It is acquiescence by an employee to known dangers or such as an ordinarily prudent man ought to have known and appreciated. An employee consenting to work in the presence of such dangers, either expressly

or impliedly, assumes the risk as one of the terms of his contract of employment. The revolving dog-roller with its projecting teeth of steel was from necessity an open and apparent danger which defendant in error assumed when under his contract of employment he began and continued to work about it. He assumed the risk of the very injury he sustained.

Contributory negligence is said to arise from tort; it springs from the conduct of the injured employee. If the danger is open, apparent and appreciated, and by reason of his failure to exercise ordinary care the employee is injured, he cannot recover, for by his fault he contributed to the injuries sustained. If an ordinarily prudent person would not, under all the circumstances, have done what defendant in error did, then by his conduct he contributed to the injury sustained and cannot recover.

The movements of the body are controlled by the mind. Men think, then act. An employee who is engaged in the presence of dangerous machinery and acts without thinking when he should have thought and is thereby injured by an open and apparent hazard, falls far short of ordinary care. If thinking, he was injured, he assumed the risk; if neglecting to think, he was injured, he is charged with contributory negligence.

We will consider each defense under a separate sub-head, and we will consider separately the question of whether the defendant in error assumed the risk of his injury, or whether he was guilty of negligence contributing thereto.

A.

THE DEFENDANT IN ERROR WAS INJURED AS A RESULT OF A RISK WHICH HE ASSUMED AND HE THEREFORE CANNOT RECOVER, AND THE LEARNED DISTRICT COURT ERRED IN DENYING THE MOTION OF THE PLAINTIFF IN ERROR FOR DIRECTED VERDICT.

Prior to March, 1907, section 1970 of the Civil Code of California read:

“An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business.”

It will be observed that this was but a statutory declaration of the rule of the common law relative to the relation of master and servant. It was deemed advisable to modify the common law rule with relation to the defense of the negligence of a fellow servant and in March, 1907, section 1970 of the Civil Code was amended as follows:

“An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless

the employer has neglected to use ordinary care in the selection of the culpable employee; provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad, train, switch signal point, locomotive engine, or other appliance than that upon which the employee is injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine shop, or other industrial establishment.

“Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continued in the use thereof.”

It will be noticed that the section as it had stood for years was re-enacted without change. The amend-

ments, added, simply modified the common law rule in relation to the defense of a fellow servant. As we shall hereafter show, the declaration in the second paragraph of the statute as amended, did not attempt to change or modify the rule of the common law with relation to the defenses of assumed risk and of contributory negligence. Indeed, the Supreme Court of California has twice expressly so held.

See

Bresette v. E. B. & A. L. Stone Co., 162 Cal.
74, 80;

Hall v. Clark, 163 Cal. 392, 395-396.

The amendment to the statute was merely a legislative declaration of the judicial interpretation of the common law with reference to the defense of assumed risk. Prior to 1907 it had never been the law that a servant was barred from recovery because of any defect in ways, machinery or structures with which or about which he was required to work unless he appreciated the danger incident thereto, or should, by the exercise of ordinary care upon his part have appreciated it.

See

Sanborn v. Madera Flume etc. Co., 70 Cal. 261,
267-268;

Nofsinger v. Goldman, 122 Cal. 609, 618;

Pigeon v. Fuller, 156 Cal. 691, 697;

St. Louis Cordage Co. v. Miller, 126 Fed. 495,
511.

Indeed, the very doctrine of the assumption of risk was founded upon the fact that the servant knew of the danger and the risks incident thereto, or by the exercise of ordinary care should have had such knowledge and by accepting the employment impliedly consented to assume the risk.

At the trial of this case counsel for defendant in error contended, and the learned District Court held, that the second paragraph of the amendment of 1970 had engrafted a new rule of law upon the relationship of master and servant and had, to a considerable extent, modified the defense of assumed risk.

As we have heretofore pointed out, and will hereafter show at length by quotations from decisions of the Supreme Court of California (pages 47-54, *post*), the amendment did not change the rule relative to assumed risk.

Accepting, however, for the moment, the contention advanced in the District Court by learned counsel for defendant in error, that the amendment had made a change in the law, still, we assert that under the most liberal interpretation that can be given to section 1970, the defendant in error must be held to have assumed the risk of his injury. To demonstrate this it is but necessary to quote from his testimony. On cross-examination he stated:

“I have not been in the mill since this accident. I have testified about the way the machinery [124] was operated; those were all things that I knew myself; I knew myself in a general way how the mill was run, and knew how the machinery was operated; I never had any experience before this. When I went to work there,

I studied the machinery and went to the man in charge of it whenever I didn't understand something about it, so that I understood the general operation of the mill." [Trans. of Record, p. 128.]

With this statement borne in mind, the testimony on direct examination and cross-examination shows beyond question that he knew everything about the operation of the mill from the time the log was taken out of the water until it was loaded by himself and fellow employees.

We quote from his direct examination (*italics throughout testimony are our own*):

"I will tell you what I know of the way the mill operated from the time the log was dragged from the bay onto the big log-carrier until the lumber was delivered over [93] this trimmer. The log was put on the main carriage that is up on the mill, to saw all the lumber. It carried it back and forth past a band saw. As it sawed off each slab of boards, whichever happened to come first, it was dragged down on to a carrier. That mechanism is not represented here at all, it is away up in the fore part of the mill. I am demonstrating from the south end, which was at the bay where the logs come up from the bay. The mill was on the west side of all that is represented here. These posts here are the mill posts of the east wall, and the mill itself is on the west side of what would be this model. That was the mill for sawing these logs into lumber. Each time this carriage would come past the band saw, it would saw off a board. The carriage would move rapidly or slowly, it was under the control

of the sawyer. Then the boards would drop on to a push-table which would push them longways. That is not this push-table, it is another one in the mill. It would push them endways until they came to the edge of the table where they were shoved off sideways to the edger, then they would drop down on to a carrier-table and carried east to the trimmer. And the trimmer was located right directly there, as though you inclined a place from the east side of the mill at an angle of some degrees downward and inward of the mill which was in the neighborhood of 30 feet long and 12 feet wide. That had saws in, directly every two feet, so they could put a board on there the full length of the trimmer and cut it up into two-foot lengths in one cut, and various places they would saw in between, which would make it a foot, so this was all controlled by the trimmer. They had a number of saws so it could be cut [94] into two-foot lengths, but each saw was controlled by the trimmer. The business of the trimmer is to operate all these saws, he controls all the saws; by raising them up into the table, they would be in position to saw, and by lowering them, they would be below the surface of the table and would not saw. The saws were worked by the trimmer pressing down on his foot with treadles. There was one saw about every two feet, and if I remember right, in various places, one to every foot. The saws were operated according to the size the boards would have to be trimmed up to. The size of the boards were generally from six feet long to the full length of the table, governed by the condition the board was in. He used the lumber that came to him to the best advantage to make the most lumber out of. When the

lumber got to the west side of the trimmer table it continued to move upward and eastward until it got to the upper edge of the trimmer, the east end of the trimmer and the east wall of the mill. Then it dropped on the skids. I will mark the skids 'E' on the model. * * *

"The skids were out as far as the [95] trimmer went, leading on to this carrying-table. The skids extended the whole length of the trimmer, but that is not shown in this model. * * *

"After the lumber was put on to the table once, there was a continuous passage from that on until it was dumped on these skids; the lumber did not stop after that, it was carried according to the cut he had made on the board, where it would light. If it was an extra long board it would drop on this table, the push-table, Table A, and by the process of these rollers on the table. These rollers were about six-inch rollers, 4 feet long, revolving towards the south. The four to the north were smooth. The last roller on the south of the push-table was what is termed as a dog-roller. It was of the same size as the other rollers, only for the projections quite thickly of steel projecting at various lengths, and pieces of steel like bars would be in there. This part that was removed was about from the dog-roller around in the neighborhood of an inch and a half, maybe a little over, or maybe a little less. * * *

"In the further operation of the mill, supposing it to be in full operation, [96] these bands on the carrying-table represent endless chains. There are four or five of them and they moved eastward at right angles eastward from the movement of the lumber from the push-table.

The lumber from the push-table came on to the carrying-table at the same time the lumber was coming from the trimmer on to the carrying-table. The two streams of lumber came together there on the carrying-table.

* * *

“In the model, the wire on the east end of the side, lengthwise of the east side of the push-table A, represents a shaft, a two-inch shaft running the length of the table, to revolve the rollers. All these rollers, including the dog-roller, were connected with the same shaft. The power was applied to them at the south end of the table, that is, of the shaft down in there. [Pp. 95 to 101, Trans. of Record.]

“As near as I can estimate, the number of revolutions of that shaft is around the neighborhood of 100 revolutions a minute. I never gave any thought to the shaft itself, the shaft being rolled through gears. I don't know whether it is geared up or lower, but it runs, in order to run the rollers at about 100 revolutions a minute. If I remember rightly the shaft runs the same as the rollers, being they were connected up with cogs in such a way that it would have to turn at the same rate as the rollers, making it about 100 revolutions. The shaft was in operation during all the time that the work was going on, sawing and delivering of lumber. This gang of four employees had to keep everything clear, up to the trimming-table, to the time they got the lumber. They had to keep clear all along those skids, and on the push-tables, and on the trimming-table.

“Q. On the trimming-table, you mean? A. On the carrying-tables.

“Those four men were the only employees who were charged with the duty of having the lumber that came from the mill, loading them on trucks and keeping the skids and push-table and the carrying-table in operation and unclogged. The mill is not worked that way now. [Trans. of Record, p. 103.]

I had been working about two weeks, and the machine stood idle for about a week, and during that time this machinery was put in, this new machinery. I don't [103] know for what purpose the two joists or beams between the push-table and the carrying-table are there, but it was covered with boards, making a little platform in between there. There was a platform there. The height from the loading-table up to that little platform as shown on my plat was 2 feet 4 inches. This does not show the planks across, but there were boards. That was an actual platform, and the height was 2 feet 4 inches from the loading-table. From that little platform or step up to the carrying-table was one foot three inches. The top of the push-table above the carrier-table was two feet.” [Trans. of Record, p. 106.]

On cross-examination, with reference to the time he had worked, after the installation of the push and carrying-tables, defendant in error said:

“This machinery that was put in during the interval when my employment stopped and before Mr. Kelty re-employed me was the push-table and the carrying-table; they had not been there before; they were the new machinery. They had been there about two weeks before this accident occurred; I had worked during those two weeks, and it was during that two weeks that Mr. Kelty

You cannot necessarily step over it easily after you get used to it. I had to step from B. I did that several times every day, and sometimes a great many times a day. * * *

“I could see trucks of lumber standing all around. I thought the truck was too low, or too high, I don’t remember which, to go up on. I have gone up on trucks of lumber, but I generally went over the way I went that day. I was in the act of stepping over and the next thing I knew my foot was caught. There was a little board down by the side there, my foot was caught between the edge of the board and the roller. [110] I could not say what the board was there for. *I had seen it there very often. Of course, when I stepped over I knew the roller was there.* I do not know how it was that I happened to get my foot caught that time; it was done so quick—just like a flash. My intention was to get that board out because there was other lumber coming, and the next thing I knew my foot was caught, even before I had any pain at all. *I intended to make the step the same as I had usually made and clear it,* and suddenly I felt my foot was caught, and the next instant it was being crushed. * * *

“Mr. Keltie was our foreman. I never spoke to him or ask him if there was any way of getting up except over this dog-roller. I never made any complaint to anybody about it. I had no idea that I was going to get hurt the day of the accident when I considered going up over that dog-roller. I had done it probably a hundred times and had no idea that there was any danger to me of an accident, until my foot got caught.” [111] * * * [Trans. of Record, pp. 112-115.]

On cross-examination in the deposition, by his own counsel, he said:

“When a jam occurred there was an arrangement for stopping the mill in some parts of the inside, or from the engine direct, the engine that propelled all the machinery of the mill; in general, the power was all furnished from one engine in running all these different portions of the mill. [Trans. of Record, p. 117.]

“I was the most active of the gang in which I was working. I was then about seventeen years, three months and a half old. [115] I was very well grown and strong for my age. The other men went up there at times, but I did the most of it.” [Trans. of Record, p. 119.]

“Mr. Evenson saw us get up there many times. He was about the mill constantly. He never cautioned me about this dog-roller or explained to me anything about the danger of the work there. Mr. Kelty never gave me any such caution; he knew the men were doing this work in that way. At the time Mr. Kelty told me to get up and release the jam, sometime before this accident, I got up on the carrier-table—being at the first place, I cleared out what there was there, and I got up on the push-table, the same way I did when I got hurt. Mr. Kelty saw me go up there.

“Q. Did he tell you what the nature of this work was, as to keeping you on the jump? A. Well, we had to keep it cleared out as fast as the lumber came, else the mill would get ahead of us.

“It was constantly heavy work; had to keep on the move from morning till night unless the mill happened to stop, when they were changing the saws, or some-

thing like that, then we would get a little rest. [Trans. of Record, p. 122.]

“Q. Of course you knew it would be easy to get your foot hurt if you got your foot caught in the roller?

A. I never gave any thought to it.

“Q. You would have if you had stopped and looked at it? A. Not necessarily.

“Q. *You knew it was revolving?* A. *Yes, sir.*

“Q. You didn't mean to get your foot in? A. No, sir. But as to knowing it would be dangerous, I never gave any thought to that.

“I would not have experimented or stuck my foot in it if I could have helped it. I intended to step over it and by it. I would not have gone if I had known I would get my foot caught.” [Trans. of Record, pp. 126-127.]

His testimony at the trial, on cross-examination, was as follows:

*“Roughly, I knew the entire process then as well as now. I was practically as familiar with the machinery of the Benson Lumber Company Sawmill at that time, except I didn't know the measurements. I knew the general course as to how the lumber was handled, how it was carried up to the trimmer and carried down the skids to the table, and then lengthwise on to the receiving-table, and then loaded from there on the lumber trucks or lumber buggies, and disposed of. I had been through the mill. * * **

“I am interested in new things. Interested enough to become a student of mechanics, and take lessons in this kind of work. I suppose I could say I was in-

terested in mechanics. I believe those things interested me a little more than ordinary matters that mechanics have to deal with. When I went down there and saw this machinery, I don't believe I examined the spike-roller or dog-roller. *When the machinery started running, I found out the purpose.* * * *

"That is the board that I marked X on the model. That board is removed from the spike-roller about an inch and a half, to estimate the exact distance, or maybe two inches,—in that neighborhood. In regard to the distance from the cylinder or the spikes under the roller as they came around, it was left just clearance enough from the spikes for them to clear, maybe an inch and a quarter or inch and a half, maybe as close as an inch, it might have been." [Trans. of Record, pp. 135-138.]

"I can't say whether my foot caught in there as I went up or whether I stepped clear up and my foot slipped back in again. It was all done so quick I can't form any opinion. The whole transaction only occupied a very few seconds. * * * *When I started to get up, I think the carrying-table was absolutely free of lumber. There was no lumber coming down. I did not speak to anybody before I started up. I didn't tell anybody I was going to go up. I did not make any effort to stop the mill before I started up. I had been up there many, many times before. Practically always went up the same way. I believe I had mounted the push-table while this continuous process of moving the lumber was going on. There was danger of having your feet knocked from under you by the timber that*

was coming down, if you jumped up in that way. I don't think I appreciated that fact at that time. *I knew that roller was revolving.* As near as I can remember, the roller made about a hundred revolutions a minute. I never gave any thought to whether or not if I put my foot in there it would knock the teeth of the roller out.

“Q. You knew that, you didn't have to think of it.
A. I didn't try it.

“Q. There are some things you don't have to think about; didn't you know, without stopping to think, if you got your foot in there that it would not hurt the roller? A. I know it now. I didn't stop to think about it then. *I suppose I knew it. Most likely I knew if I got my foot in there it would be injured.* I don't see how you can expect me to state that I knew if I got my foot in there I would be badly injured, at least would be injured, *when I never gave it a thought at the time. I suppose I ought to know it if that is what you mean. I knew the board X in the model was there. I never attempted to put my foot on that board by stepping on the carrying-table on the board and then over.*

“When I have given the distance as two feet from the carrying-table to the push-table, I mean that portion of the push-table right to the edge of the roller. The diameter of the roller is six inches. The space between the board marked X and the extreme south end of the platform or push-table is about nine inches. In order to land safely upon the platform and not be in danger of getting my foot in the roller, I had to clear that roller entirely. And it extended out about an inch

above the surface of the platform. I had to step two feet up and two feet and at least nine inches, in order to clear it. [Trans. of Record, pp. 149-151.]

“When I saw the jam on the push-table on the 30th, the reason I did not stop the trimmer was because I knew it would cause an accumulation of lumber on the trimmer, and I thought about that and took the other means. I went ahead to clear it out. Generally we had time to clear it out before any jam comes from the trimmer.” [Trans of Record, p. 155.]

“Q. You appreciated if you put your hand in that revolving [151] dog-roller, it would get torn and get hurt, did you not? A. *I never gave any thought to that either. If I had thought, most likely I would have known it. I never had any occasion to think of it.*” [Trans. of Record, pp. 156-157.]

“I do not know what this board which was immediately in front of the spike-roller was for. I was informed afterwards that it was there for the purpose of avoiding getting your clothes in the teeth of that roller when you got up on the platform.” [Trans. of Record, p. 159.]

“I knew what the push-table was for, simply to carry the lumber back into position again. I knew what the carrier-table was for. I knew that the lumber came down with considerable force. *I knew it bumped up against this bumper out here, to keep it from falling off the push-table. I suppose I did know that if I got on there I would be likely to be hit by the large pieces, and knocked off my feet. I suppose I thought about it most likely.*” [Trans of Record, p. 165.]

We believe it is impossible to read the above statements of defendant in error without a firm conviction that he fully comprehended the dangers incident to his work. His study of the mill during his employment prior to his unfortunate accident was sufficient to enable him, years after, to draw a diagram of it and to give a detailed and accurate account of its entire operation, notwithstanding the fact that he had not been in the mill after his catastrophe. There was nothing concealed or latent about the dog-roller; it was in plain sight and its danger obvious to anyone. For two weeks prior to his injury the defendant in error had seen the dog-roller in daily operation; he knew that it was revolving at the rate of one hundred revolutions per minute; he knew there were iron spikes upon it; he knew that the dog-roller and other rollers in the push-table had force enough in their revolutions to push the lumber forward from the push-table to the carrying-table; surely he knew that if he allowed his foot or any part of his person to come into contact with an iron roller armed with long spikes, revolving with such force, that injury must result. Any child of six would know this. It is true that the defendant in error asserts he was not warned of the danger of stepping over the dog-roller. Although his testimony is in contradiction to that of two disinterested witnesses, we must assume that the jury accepted it as true. But what further warning could any person have given him than was afforded him by his senses? It was not necessary for his employer to tell him that fire would burn, or revolving iron crush and mangle. In the first of his testimony he said that he observed the saws of the

trimmer in rapid revolution. If he had attempted to pass over one of these saws instead of over the spiked roller, could he avoid the defenses of assumed risk or of contributory negligence by stating that he did not appreciate the danger of his acts because he did not stop to think the whirling saw would cut his flesh as readily as it would cut lumber? Yet, the danger of stepping over the roller was just as apparent as that of passing over the saw. He knew the roller was armed with sharp spikes and revolving at a tremendous speed. Every minute of the day he saw its teeth catch heavy lumber and move it swiftly forward. Surely he must have realized that if flesh and blood came in contact with these whirling iron spikes, injury would follow. Indeed, he said:

"If I had had occasion to stop and think I would have known and appreciated that there was danger."
[Trans. of Record, p. 166.]

One cannot thus close his eyes to obvious danger and recover for injuries he could easily have avoided. He cannot voluntarily blindfold himself and say he did not know he was in peril or that he should have been warned against the danger he could easily have seen.

But, if it be true, as contended by counsel for defendant in error, and as held by the learned District Court, that under the amendment of 1907 an employee did not assume the risks which he did not actually fully understand and appreciate, although his failure to so understand and appreciate them was due to a lack of ordinary care on his part, still there could be no re-

covery. Under such circumstances, although the defense of an assumed risk would be defeated, that of contributory negligence would be conclusively established. There would be no escape from the proposition that the employee had exposed himself to a danger he did not understand through a lack of ordinary care upon his part. Negligence simply consists of unnecessarily exposing one's self, or others, to danger through lack of ordinary care.

But, notwithstanding his many protestations that he did not stop to think of his danger, his own declarations contradict him. We quote again from his evidence:

"I intended to step over it and by it. I would not have gone if I had known I would get my foot caught."
[Trans. of Record, p. 127.]

Why would he have desisted from going over the roller if he had known he would get his foot caught, unless he realized that getting it caught would be injurious to him?

Again, it will be remembered that he testified that he had gone over the roller many times a day for a period of at least two weeks and had always stepped clear of the roller, thus showing that he realized that it would be dangerous to come in contact with it. Indeed, that a boy seventeen years old did not know that to get his foot caught between a board and a spiked roller making one hundred revolutions per minute would injure him, is so absurd that, as we have shown, on cross-examination, he was forced to admit:

"Most likely I knew if I got my foot in there it would be injured." [Trans. of Record, p. 150.]

As we have seen, he had in mind the fact that lumber was coming over the push-table, for he stated on his cross-examination that he had stopped the trimmer before, but he did not do it on that occasion because he did not think it was necessary; that when the trimmer was stopped there was no lumber coming over the skids or onto either table; that he thought about the advisability of stopping the trimmer and decided not to. [Trans. of Record, pp. 155-156.] Thus, it is clearly apparent that he not only knew the dog-roller was revolving rapidly, but that lumber was passing upon both tables, and as we have before seen, he repeatedly said that in going on either table he had to guard against being struck by lumber. Yet he deliberately decided not to stop the trimmer, but run the risk of being struck by lumber as he passed over the dog-roller.

A clearer case of the assumption of risk, under the most liberal interpretation of the amendment of 1907 (even assuming that it changed or modified the rule of common law), we are unable to understand.

In

Hall v. Clark, *supra*, 163 Cal. 392, 395,

the plaintiff was driving a dump wagon engaged in excavating a cellar. The defendant had a runway constructed into the cellar. After the plaintiff had dumped a load of earth which he had hauled out of the cellar and while driving toward the runway the defendant's foreman halted him and told him to drive into the excavation over a perpendicular bank three and a half to four feet high. Plaintiff answered, "Where—off there?" The foreman answered, "Yes." Plaintiff re-

plied, "I can't drive off there." The foreman asked "Why?" and plaintiff replied, "It will hurt the mules." The foreman answered, "Never mind that, that is where I want the wagon to go over there." And, the plaintiff relying on the directions of the foreman, and without stopping to think that he might be injured, drove off the bank. Of course he was hurt. Defendant's motion for a directed verdict was denied and a verdict returned by the jury in favor of the plaintiff and against the defendant, on which the trial court denied a new trial. In the Supreme Court it was contended, as here, that the second paragraph of the amendment of 1907 had worked an important change in the defense of assumed risk; that unless actual knowledge of the danger to be incurred be fastened upon the injured servant, he could not be held to have assumed the risk. The Supreme Court of the state of California expressly held that the amendment of 1907 made no change in reference to the rule of assumed risk, saying in part (the italics are ours):

"It is thoroughly settled that an employee is not warranted in following the direction of an employer, except where he acts under what under the law amounts to duress or coercion, where the danger to be encountered in doing so is at once so obvious and so serious that no ordinarily prudent person of similar age and experience, situated as was the employee, would have obeyed the order, and that where the rules as to contributory negligence and assumption of risk are such as they were

in this state at the time of this accident, the employee receiving personal injuries by reason of following such direction cannot recover damages therefor from his employer. It is not disputed by counsel for plaintiff that this was the law in this state prior to the amendment of section 1970 of the Civil Code, in 1907, (Stats. 1907, p. 119), by which the legislature added to that section, among other things, a provision that knowledge by an employee injured of the defective or unsafe character of any machinery, etc., shall not be a bar to recovery for any injury caused thereby, unless it shall also appear that such employee 'fully understood, comprehended and appreciated the dangers incident to the use of' the same. *This amendment did not change the rule we have stated.* If the danger is so obvious and serious that no ordinarily prudent person of similar age and experience, situated as was the employee, would have done the act, even though ordered by his employers to do it, it is manifest that the situation is such that the employee will not be heard to say that he did not fully understand, comprehend, and appreciate the danger incident to the doing of the act. As said by this court in *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 600, (49 L. R. A. 33, 60 Pac. 176, 177): '*He cannot be allowed to close his eyes to the danger, and thereafter say, "I did not know it was dangerous."*' "

Bresette v. E. B. & A. L. Stone Co., 162 Cal.

74, 77,

is on all fours with the case at bar. There the appellant, plaintiff below, brought an action to recover for the loss of his arm. He alleged that he was employed by the defendant as an oiler; that he had been a barber before that and had no experience in the operation of machinery. As a part of his duty, in oiling some of the machinery he had to reach across moving and unguarded gears, and that, while doing so, the sleeve of his left arm was caught in the revolving gears and his arm injured to such an extent that it required amputation. He alleged negligence of the defendant in failing to have the gears properly guarded and in failing to appropriately instruct him as to the danger; and further, that, owing to his inexperience, he did not appreciate the danger of his work. The Supreme Court of this state held the last allegation unavailing, and that the complaint did not state a cause of action, saying (the italics are ours):

“The allegations of the amended complaint hereinbefore substantially set forth show that the sole reason for the unfortunate injury to plaintiff was that he allowed the sleeve of his coat to catch in certain exposed and uncovered gearing over which it was necessary for him to reach in the performance of his work as an oiler. The complaint in one count is substantially that the defendant was negligent in not warning him, he being a man inexperienced in the use of machinery, as to the danger and the necessity for care in the performance of

this duty, and in the second count that the defendant was negligent in setting him to work in a place dangerous by reason of the fact that the gearing about which he was compelled to perform his work was unprotected and unguarded. There is absolutely nothing in the complaint to intimate that the exposed condition of this gearing was not obvious. Fairly construed, the allegations of the amended complaint affirmatively show that the only condition of the machinery having to do with plaintiff's injury was patent to any casual observer, and that any one, no matter how inexperienced he was in the use or knowledge of machinery, would necessarily know of the risk entailed in working over the gearing, and that if he allowed his hands or arms to come in contact with the gearing, he would be severely injured. Whatever danger was attendant upon the performance of his duties by plaintiff in that place, was clearly apparent to any one. That danger was the possibility of allowing his hands or arms to come in contact with the uncovered and unguarded gearing. That one's hands or arms will be hurt if allowed to become involved in the cogs of moving machinery is so apparent a fact that certainly any adult must know it. In spite of such a general allegation of the absence of knowledge on the part of the employee as we have in this case, a complaint is demurrable if the specific allegations thereof show that he must have known of the defects and the danger therefrom.

(See 1 Labatt on Master & Servant, sec. 388; Cleveland etc. Co. v. Powers, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485.)

“Under these circumstances, even if we assume that there was any negligence on the part of defendant in respect to the matters alleged in either count, a complete answer to plaintiff’s action is to be found in the law relative to assumption of risk as it existed in this state at the time he received his injuries. With full knowledge of the alleged defect in the matter of the machinery, and with full understanding and appreciation of the dangers therefrom attendant upon the performance of his duties as oiler, he voluntarily entered upon the employment and continued therein to the time of his accident, a period of nearly two months, without making any complaint as to the conditions. As to such a situation, under the law as it was at the time of the accident, there is practically no disagreement among the authorities. The employee assumes the risk, and cannot recover for injuries resulting therefrom. This rule is recognized by section 1970 of the Civil Code, where it is provided that mere knowledge by an employee of the defective or unsafe character or condition of any machinery, etc., shall not be a bar to recovery, unless it shall also appear that the employee fully understood, comprehended, and appreciated the dangers incident to its use, and thereafter consented to use the same or continued in the use

thereof. *It was not until the act of April 8, 1911, (Stats. 1911, p. 796) was enacted that any attempt was made to abolish the defense of assumption of risk. The rule and its limitations have been fully discussed in various decisions of this court. (Citing numerous decisions rendered previous to 1907.)* 'The requirement that the place of employment shall be reasonably safe is itself always to be considered in connection with the rule of law as to the assumption by the employee of known and understood risks.' There is nothing in the facts of this case as disclosed by the complaint to take it out of the operation of the rule precluding recovery. The facts shown by a fair construction of the allegations of the complaint present a case where the only inference that can reasonably be drawn is that plaintiff knew that the gearing over which he was to reach in doing his work was uncovered and unguarded, and understood and appreciated the risk and danger attendant upon the performance of his work under such conditions, and that he nevertheless voluntarily assumed his employment without any complaint as to the conditions, and continued therein to the time of the injury, a period of nearly two months, without any complaint or criticism of such conditions.

"In view of what has been shown as to the obviousness of the danger, it is also clear that the defendant was not guilty of negligence productive of injury in failing to instruct plaintiff as to such

danger. There was nothing to tell him in this regard that he did not already know or must be presumed to have known. In this connection, the language of the Supreme Court of Massachusetts in *Wilson v. Mass. Cotton Mills*, 169 Mass. 67, (47 N. E. 506), is pertinent. The court said: 'The plaintiff's contention is that he was set to work on a dangerous machine without proper instructions. But it is difficult to see what the defendant's officers could have told him that he did not already know. *It was apparent that the wheels were uncovered. They were certainly not bound to tell him that if he got his hand in the cogs he would be hurt. This any child of ten would know.*'" (pp. 77-79.)

We are unable to distinguish the above case from the one at bar. To us they seem identical.

Mr. Coffin testified that he either saw or thought a piece of lumber struck McCann's foot. McCann, however, testified, as we have seen, that there was no lumber coming onto either table at the time he started for the push-table. But, whether his foot was caught by his making a misstep or by being struck by lumber, is immaterial, the danger of either was open and apparent. For two weeks he had seen and known that lumber traveled on both tables; he knew the trimmer was in operation; he said many times that he realized when he got upon either the push or carrying

tables he had to watch out to avoid being struck by lumber [Trans. of Record, p. 165]; that he could have stopped the trimmer and so have stopped the flow of lumber; that he thought of that before starting for the push-table, but decided not to stop the trimmer. [Trans. of Record, pp. 155-156.]

It doubtless will be urged here, as it was in the district court, that the defendant in error was a minor and therefore did not assume the risk of his injury. No proposition is better established than that a minor, as well as an adult, assumed all risks of which he knew or should have known by the exercise of ordinary care.

In

St. Louis Cordage Co. v. Miller, *supra*, 126 Fed.
495, 511, *et seq.*,

the plaintiff was a girl twenty years old. She attempted to stop a machine at which she was working. Her hand slipped from the lever which controlled the machine and her fingers were caught and crushed in the unguarded cog wheels which had been negligently left exposed. It was held that the trial court erred in not directing a verdict for the defendant for the reason that the plaintiff assumed the risk of her injury, the court saying in part (the italics are ours):

“It is suggested that the plaintiff was only 20 years of age, but she had been employed in factories for many months, and the danger from mashing cogs that had been visible to her for six weeks was as apparent and appreciable to a woman of her age and experience as to a person of greater

age or more extended experience. *She could not fail to know as well at 20 as at 40 years of age that fire would burn, or mashing cogs would crush her fingers.* A person 20 years of age assumes the risks and dangers that he actually knows and appreciates, and those that are so apparent that one of his age and capacity would in the exercise of ordinary care know and appreciate them to the same extent as one of more mature years. *Bohn Mfg. Co. v. Erickson*, 5 C. C. A. 341, 344, 55 Fed. 943, 946; *Engine Works v. Randall*, 100 Ind. 293, 298, 300, 50 Am. Rep. 798; *Berger v. Ry. Co.*, 39 Minn. 78, 38 N. W. 814; *Sullivan v. Mfg. Co.*, 113 Mass. 396; *Fones v. Phillips*, 39 Ark. 17, 38, 43 Am. Rep. 264.

“Now, while it is true, as the decisions to which we have adverted declare, that mere knowledge of a defect by a servant who continues in the employment does not necessarily establish the fact as a matter of law that he has assumed the risk it entails, and while it is also true that he does not assume such a risk unless an ordinarily prudent person of his capacity in his situation would have appreciated the danger from it, it is equally true that a servant who enters or continues in the employment of his master in the presence of visible or obvious defects and plain or apparent dangers from them, which he knows or appreciates, *or which an employe of his intelligence and capacity would by the exercise of ordinary care and prudence know and appreciate*, assumes the risk of

these dangers, and he cannot be heard to say that he did not appreciate them, and when the uncontradicted evidence establishes these facts no case arises in his favor, no question remains for the jury, and it is the duty of the court to peremptorily instruct them to return a verdict for the master. This is a familiar and well-established rule of law. It is sustained and illustrated by the following cases, in which courts have held that it was the duty of the trial court to direct a verdict for the employer: Higgins Carpet Co. v. O'Keefe, 51 U. S. App. 74, 80, 79 Fed. 900, 902, 25 C. C. A. 220, 222, in which a boy 15 years of age who had been at work in a room with a picking machine was assigned to feed it, and permitted his hand to slip into the exposed cogs, which the factory act of New York required the master to keep covered; Buckley v. Mfg. Co., 113 N. Y. 540, 21 N. E. 717, wherein a boy 12 years old slipped and threw his fingers into exposed cogs; Engine Works v. Randall, 100 Ind. 293, in which a boy 19 years of age permitted his hands to engage with revolving cogs; Berger v. Ry. Co., 39 Minn. 78, 38 N. W. 814, wherein a boy in feeding rollers in a boiler-making shop permitted his hand to slip between them; Kleinst v. Kunhardt, 160 Mass. 230, 35 N. E. 458, wherein the servant fell upon a slippery floor and threw his hand against a pulley, which injured it; Tuttle v. Detroit & Milwaukee Railway, 122 U. S. 189, 195, 7 Sup. Ct. 1166, 30 L. Ed. 1114, in which the Supreme Court held that a

brakeman could not be heard to say that he did not appreciate the dangers of a sharp curve in the railroad track, from which he suffered injury; *Kohn v. McNulta*, 147 U. S. 238, 241, 13 Sup. Ct. 298, 37 L. Ed. 150, in which the same court held that double deadwoods on cars were obvious defects and the danger from them was apparent; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 154, 155, 14 Sup. Ct. 530, 38 L. Ed. 391, wherein that court made the same holding, and entered the same judgment, in an action for injuries caused by an unblocked frog; *King v. Morgan*, 48 C. C. A., 507, 509, 109 Fed. 446, 448, a case of an injury from the use of an iron tamping bar instead of a wooden one; *Cudahy Packing Co. v. Marcan*, 45 C. C. A., 515, 517, 106 Fed. 645, 647, where a block on which a boy 17 years of age was standing slipped upon the greasy floor and caused him to throw his hand into a hasher; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, wherein a servant wheeling coal fell from an unprotected way which the factory act of Massachusetts required the master to keep guarded; *Glover v. Bolt Co.*, 153 Mo. 327, 55 S. W. 88, in which a boy engaged in pulling iron from a pile fell and placed his fingers between closing shears; *Mundle v. Mfg. Co.*, 86 Me. 400, 404, 30 Atl. 16, in which a servant received a sliver in her foot from the floor on which she was working; *American Dredging Co. v. Walls*, 84 Fed. 428, 429, 28

C. C. A. 441, 442, wherein the servant slipped, fell, and his hand was caught in the machinery because there were no cleats on a slippery inclined table upon which he was required to go to oil the machinery; *Hoard v. Mfg. Co.*, 177 Mass. 69, 71, 58 N. E. 180, and *Whalen v. Whitcomb*, 178 Mass. 33, 34, 59 N. E. 666, wherein servants were injured by depressions in the floors on which they were working; *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35, 39, 59 N. E. 645, in which the hands of a boy 19 years of age who was feeding rubber between rollers were caught and injured by the rollers; *Ford v. Mount Tom Sulphide Pulp Co.*, 172 Mass. 544, 546, 52 N. E. 1065, 48 L. R. A. 96, wherein the servant was injured by a set screw in a revolving shaft which had been placed there during his service. * * *

“The record in the case at bar has been searched in vain for any fact or testimony adequate to withdraw it from the principles of law established by this strong current of decision, or to distinguish it from the cases which have been cited to illustrate the rule. This plaintiff was a young woman 20 years of age. The presumption is that she was possessed of ordinary intelligence and ability. She had been at work in factories for more than a year, and in the establishment of the defendant for more than six months. She knew that the gearing which injured her had been covered before Christmas, and that it was uncovered from that time until she was injured, on February 13, 1902. She had

worked at this machine by the side of the exposed mashing cogs from 10 to 15 minutes every day during the six weeks that they remained uncovered. She testified that she did not know that it was dangerous to run the gearing uncovered, but she knew the action of the lever, the greasy condition of its handle, its proximity to the mashing cogs, *and she could no more have failed to know and to appreciate that the revolving cogs would crush her hand if she permitted it to slip between them than she could have failed to appreciate that boiling water would scald or fire would burn. One cannot be heard to say that he does not know or appreciate a danger whose knowledge and appreciation are so unavoidable to a person of ordinary intelligence and prudence in a like situation.* King v. Morgan, 48 C. C. A. 507, 509, 109 Fed. 446, 448; Moon Anchor Consol. Gold Mines v. Hopkins, 49 C. C. A. 347, 353, 111 Fed. 298, 304; Sullivan v. Simplex Electrical Co., 178 Mass. 35, 39, 59 N. E. 645; Buckley v. Mfg. Co., 113 N. Y. 540, 21 N. E. 717. The machinery, the cogs, the slippery lever, and their relation to each other, were open, visible, known. There was nothing recondite, imperceptible, uncertain, in the danger impending from them. It was plain and certain that if the employe permitted her hand to slip between the revolving cogs, that hand would be injured. The defect of the unguarded gearing was obvious, the danger from it was apparent, and, without a disregard of the rules to which we have adverted and

the decisions of the Supreme Court and of the other courts of the country to which reference has been made, there is no escape from the conclusion that the evidence in this case established without contradiction or dispute the facts that the plaintiff, by continuing in her employment without complaint, in the presence of an obvious and known defect and of a plain and apparent danger, assumed the risk of the injury which she sustained, so that she never had any cause of action against the defendant; and the court below should have so instructed the jury. The judgment below is accordingly reversed, and the case is remanded to the Circuit Court for a new trial." (pp. 511, 512, 513, 514.)

In

Buckley v. Guttapercha & Rubber Mfg. Co.,
supra (N. Y.), 21 N. E. 717, 718,

the plaintiff, a boy twelve years of age, was required to work about exposed and unguarded gears. While doing his work he slipped and fell to the floor, and, throwing out his hands to save himself, was caught in the gears and was injured. It was held that he assumed the risk of his employment, the New York Court of Appeals saying in part:

"It was not needful to instruct him that the cogs were dangerous, because that was obvious. He could see as well as anybody that if his fingers got into the cogs they would be crushed to pieces. He was not injured because he did not know that the cogs were dangerous, but the injury happened because he slipped and fell, and instinctively threw out his hand to recover himself. His falling was

a mere accident, and no amount of instruction or caution from the agents of the defendant would have prevented the accident, and saved him from the injury. His injury did not come from any ignorance of the machines, or of the danger to which he was exposed, but it came solely from the accident." (p. 718.)

The language is especially appropriate to the case at bar. It is evident that the unfortunate injury was not caused by any failure of the defendant in error to appreciate the danger of stepping over the roller, but from his accidentally getting his foot caught between the roller and the "X" board. We again call attention to his positive statement on page 127 of the record, that he intended to step clear of the roller, that if he had known that his foot would come in contact with it he would not have attempted to step over it. Had his employer warned him ten times a day that the roller would injure him if he touched it, the accident would not have been prevented, for it was not caused by his intentionally stepping upon the roller in a mistaken belief that it was harmless, but by the fact that his toe accidentally struck it, when he intended to step over it.

Again we quote his statement:

"Most likely I knew if I got my foot in there it would be injured." [Trans. of Record, p. 150.]

See also:

Hackney v. Taaffe, 105 N. Y. 30, 37, 12 N. E.
286,

where a girl fourteen years old allowed her hand to

be drawn into the unguarded rolls of a laundry which were open and apparent.

In

Higgins Carpet Co. v. O'Keefe, 79 Fed. 900, the plaintiff, a boy twelve years of age, had been engaged for three days prior to the accident in feeding material into unguarded gears. On the second or third day of his employment he allowed his hand to be accidentally caught in the gears. The learned Circuit Court of Appeals for the Second Circuit, considering his case, said in part (the italics are ours):

“Error is assigned of the refusal of the trial judge to instruct the jury to find a verdict for the defendant. We are of the opinion that upon the facts the defendant was entitled to this instruction, and that there was no evidence to justify the leaving of the case to the jury.

“The plaintiff, although a minor, was of sufficient age and experience to be fully aware that his hand would probably be crushed if it were caught between the cog-wheels while the machine was in motion. He knew that the cog-wheels were not guarded in any way, and testified that when he was assigned to feed the machine he was told by the foreman that he must look out for himself, and be careful. He entered upon and continued in his employment with full knowledge of the risks incident to feeding or working about the machine consequent upon the location and condition of the cog-wheels and the absence of guards. If he had been an adult, it is plain that he would have had no

cause of action. *We think the circumstance that he was a minor is of no importance. The rules which govern actions for negligence in the case of children of tender years do not apply to minors who have attained years of discretion."*

See also to the same effect:

Federal Lead Co. v. Swyers, 161 Fed. 687, 693.

In

Glenmont Lumber Co. v. Roy, 126 Fed. 524, 528, the plaintiff, a boy twenty years of age, was employed in the defendant's sawmill. A part of his work was to lift lumber with a cant hook onto certain tables or platforms. He had been engaged in that kind of work six days prior to the accident. At the time of the injury his hook, which was loose, slipped as he tried to raise a log, and he fell to the floor, and as he did so his left arm was brought in contact with a revolving saw which was exposed and unguarded. He testified that he knew of the position of the saw; knew that it was in motion, and knew that his hook was loose and might slip with him, but that he did not appreciate the danger of doing the work in the way he was doing it, and that he had not been warned of the danger. It will thus be seen that the case and the one at bar are entirely similar. The learned Circuit Court of Appeals held that the plaintiff therein assumed the risk of his injuries and could not recover, the court saying in part (the italics are ours):

"An employee cannot be heard to say that he did not appreciate or realize the dangers where

*the defects were obvious, and the dangers would have been known and appreciated by an ordinarily prudent person of his intelligence and experience in his situation. * * **

“Where the uncontradicted evidence discloses the fact that the defects in the place or in the tools were obvious, and the dangers from them would have been apparent to an ordinarily prudent person of the intelligence and capacity of the servant, if placed in his situation, and the employee entered upon or continued in the service without complaint, the defense of assumption of risk is conclusively established, and the court should instruct the jury to return a verdict for the defendant.

“Every defect of which the plaintiff complains, the condition of the saw, the absence of the post at the lower end of the bumper, and the looseness of the cant hook in its socket, was obvious to a casual inspection, and was known to him within one hour after he entered upon the discharge of the duty of tending the chain. He was 20 years of age, and his testimony clearly discloses the fact that his ability, intelligence, and perception were not inferior to those of the ordinary young man of his age and experience. *A minor assumes the risks and dangers that he actually knows and appreciates, and those that are so apparent that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them, to the same extent as does the adult.*”

Similar decisions could be quoted and cited indefinitely, but we believe the foregoing more than sufficient. We recognize, of course, the fact that numberless decisions can be obtained to the effect that mere knowledge by an employee of defects to ways or machinery will not bar a recovery unless the employee knows or should know of the dangers incident thereto.

Roth v. N. Pac. Lumber Co. (Ore.), 22 Pac.
842,

is a case of this character, and was greatly relied on by the defendant in error in the district court. In that case the plaintiff was required to receive sawed lumber from the defendant's mill and to load it. Jams occurred occasionally upon a table from which the plaintiff received lumber, and it was the plaintiff's duty at such times to go upon the table and clear away the jam. The only means of doing so was over a rapidly revolving shaft. In this shaft were several set screws, but the plaintiff did not know of them, and the facts were such as not to show that necessarily he should have known of their presence by the exercise of ordinary care. He had not been long engaged in that character of work and there was evidence that he had not seen the machinery except when in operation; at such times the shaft was revolving four or five hundred revolutions a minute and the set screws were invisible. In stepping over this shaft the plaintiff's clothes were caught by these set screws and he was severely injured. It was held by the Oregon Supreme Court that it could not be said as a matter of law that he had assumed the risk of his injury. That case is apparently very

similar to the one at bar, and yet it is entirely dissimilar. The occupation of the plaintiff and the defendant in error was almost identical. Each was required to go upon the same character of table, but there the similarity ends. The plaintiff in the Oregon case did not know and could not have known that the revolving roller over which he was stepping had a set screw, and it could not be held that in stepping over the shaft he assumed the risk of being caught or struck by a projection thereon of which he did not and could not have known.

In this case the plaintiff not only knew of the revolving dog-roller, but knew that it was armed with spikes projecting to within an inch of the "X board."

Sanborn v. Madera Flume etc. Co., 70 Cal. 261,
267,

although not cited by defendant in error in the district court, is a typical case of where a servant may know of a defect and not the danger. There the plaintiff was injured in defendant's sawmill. Part of its machinery for cutting lumber was a sword, whose province was to enter the cut made in a log by a saw. A proper sword, if it failed to enter the cut, would stop the machinery. The original sword having been broken, a piece of iron was inserted in its place. The plaintiff, who had worked in the lumber yard, and was unfamiliar with machinery, knew that the sword had been broken and a piece of iron substituted in its place, but he did not know of the manner in which such sword would work. At the time of the accident the defective sword failed to enter a cut, and, instead of stopping the

machinery, hurled the log backwards onto the plaintiff. The Supreme Court of California held that the plaintiff did not assume the risk of his injury for the reason that although he knew of the character of the sword he did not know that failing to enter a cut it would not stop the machinery, saying in part:

“We simply say that it is not enough that the servant knew or ought to have known the actual character and condition of the defective instrumentalities furnished for his use. He must also have understood, *or by the exercise of ordinary observation ought to have understood, the risks to which he is exposed by their use.* * * * The mere fact that the servant knows the defects may not charge him with contributory negligence or the assumption of the risks growing out of them. The question is, Did he know, *or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks, and not merely the defects, existed?*” (Italics ours.)

The above decision was written many years prior to 1907, but it will be noted that it construed the law of assumed risk exactly as section 1970 of the Civil Code as enacted in 1907 declared it to be.

In the case at bar there is no allegation that the plaintiff was not possessed of the usual mentality of a boy of his age, and in the absence of such allegation it must be presumed that he was a boy of ordinary intelligence.

See

Limberg v. Glenwood Lumber Co., 127 Cal.
598-600;

- Dougherty v. West Superior Iron & Steel Co.
(Wis.), 60 N. W. 274-276;
Motey v. Pickle Marble & Granite Co., 74 Fed.
155-158;
Reiter v. Winona & St. P. R. Co. (Minn.), 75
N. W. 219;
Cripple Creek Sampling & Ore Co. v. Souza
(Colo.), 86 Pac. 1005-1006;
Burnell v. West Side R. Co. (Wis.), 58 N. W.
772.

This presumption of law, however, is not necessary, for the evidence given by the defendant in error showed that he was of more than ordinary intelligence. Though only seventeen years of age, he was doing a man's work. When he entered the employ of the company he undertook the study of the machinery, and his testimony shows that he understood the operation of the entire mill from the time the log was first taken from the water until the sawed lumber was delivered to him on the carrying-table. He knew that until the trimmer was stopped that lumber was delivered in continuous streams upon both the carrying and push tables; he knew when he got upon the table he had to guard against being struck by this moving lumber; he knew the position of the dog-roller and that it had teeth which projected within an inch of the "X board," and he knew that this spiked roller was revolving at least at the rate of one hundred revolutions per minute. Surely he knew and comprehended as much as any adult that if he allowed his foot to come between the revolving

roller and the board it must be seriously injured. In substance he says: "I knew this, and probably I realized that if my foot got caught between the 'X board' and the roller that it would be hurt, but I did not stop to think about it, therefore I did not comprehend the risk of stepping over the roller."

"He cannot be allowed to close his eyes to the danger, and thereafter say, 'I did not know it was dangerous.' "

Limberg v. Glenwood Lumber Co., *supra*, 127 Cal. 598-600.

"It is a rule of universal acceptance by the courts of this country that an employee assumes all the ordinary dangers of his employment which are known to him, or which by the exercise of ordinary diligence would have been known to him. It is alike the duty of the employer and employee to be diligent in the discharge of their reciprocal duties, for the avoidance of personal injury to the latter; and both are alike bound to know, and will be chargeable as knowing, all facts and conditions that a person of ordinary caution and prudence, in a like situation, would have discovered. *Neither may close his eyes nor carelessly neglect observation and inquiry for the safety of the employee, and find immunity on the ground that he did not have actual knowledge of the danger. In such cases constructive knowledge has the same force and effect as actual knowledge.*" (The italics are ours.)

Pennsylvania Co. v. Ebaugh (Ind.), 53 N. E. 763-764.

“If an employee in the exercise of reasonable care ought to have known of the dangers of the service, he will be held to the consequences of actual knowledge.”

Kansas City, M. & O. Ry. Co. v. Loosley (Kan.),
90 Pac. 990-993.

“It is the rule that obvious defects or perils, such as are open to ordinary, careful observation, are regarded by the law as perils incident to the service, and the dangers incident thereto are assumed by the servant.”

Jennings v. Ingle (Ind.), 73 N. E. 945-947.

See also

Chicago, I. & L. Ry. Co. v. Glover (Ind.), 57
N. E. 244-245;

Faber v. C. Reiss Coal Co. (Wis.), 102 N. W.
1049, 1050-1051;

Nelson v. Boston etc. Co., *supra* (Mont.), 88
Pac. 785, 786.

“It will not avail the plaintiff that he was not fully aware of his danger, for a plaintiff is bound to know the extent of the danger in cases like this, where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man.”

L. S. & M. S. Ry. Co. v. Pinchin, *supra* (Ind.),
13 N. E. 677-678.

See also

Jones & Adams Co. v. George, *supra* (Ill.), 81 N. E. 4-5;

Dougherty v. West Superior Iron & Steel Co., *supra* (Wis.), 60 N. W. 274-277;

Denver & R. G. R. R. Co. v. Sporleder, *supra* (Colo.), 89 Pac. 55-57;

Central of Georgia Ry. Co. v. Price, *supra* (Ga.), 49 S. E. 683-685;

Cripple Creek Sampling & Ore. Co. v. Souza, *supra* (Colo.), 86 Pac. 1005;

Missouri Pac. Ry. Co. v. Click, *supra* (Kan.), 96 Pac. 796.

“If an appliance be introduced after the commencement of the employment, from the use of which follows a risk which the employee knows or ought to know—that is, if the risk or danger be known to him *or be patent and obvious*—he assumes the risk by continuing in the employment.” (Italics are ours.)

Sowden v. Idaho Quartz M. Co., 55 Cal. 443-452.

We respectfully submit that both in reason and from the foregoing authorities and many more which might be cited, it must be held that as the law existed at the time of this unfortunate accident the defendant in error assumed the risk of his injury and he therefore could not recover. There was nothing to submit to the jury, and the learned district court erred in denying the motion of the plaintiff in error to direct a verdict in its favor.

B.

THE EVIDENCE MOST FAVORABLE TO THE DEFENDANT
IN ERROR, AS A MATTER OF LAW, CONVICTED HIM
OF CONTRIBUTORY NEGLIGENCE.

As we have shown, defendant in error time and again testified that he failed to appreciate the danger because he did not stop to think of it. If he did not fully understand it and appreciate it, it was because he did not pay proper attention to his surroundings or exercise ordinary care to guard himself from known and obvious dangers. At the time of the happening of this accident it was the settled law in California that it was negligence *per se* for an employee to fail, through forgetfulness or inattention, to guard himself from known dangers.

See

Brett v. Frank & Co., 153 Cal. 267;

Ergo v. Merced Falls Gas & El. Co., *supra*, 161
Cal. 334, 339;

Davis v. Cal. St. Cable R. R. Co., 105 Cal. 131.

One of two propositions must be correct, viz.: Defendant in error either fully understood and knew the dangers incident to stepping over the dog-roller, in which case he assumed the risk of his injury, or else he failed to appreciate the danger of his act through an absolute lack of care upon his part to observe the dangers which were patent. In the latter event he exposed himself to an injury without appreciating the danger thereof through a want of ordinary care upon his part, and must be held to have been guilty of contributory negligence, as a matter of law.

II.

**The Court Erred in Giving to the Jury on its Own
Motion Instruction No. V.**

The fifth instruction given by the court as set out in the transcript of the record on pages 233 and 234, constitutes the second specification of error herein (see pages 19-20, *ante*), and the third assigned error in the assignments of error [Trans. of Record, p. 267]. By that instruction the court, after informing the jury that it was the duty of an employer to exercise ordinary care to furnish his employee a safe place in which, and safe appliances with which, to work, further charged:

“The servant does not undertake to incur the risk arising from negligence in providing or maintaining a safe place in which he is to work, or suitable and safe appliances, or other means with which his service is to be performed. His contract implies that, in regard to these matters, his employer will exercise reasonable care in making adequate provision that no danger shall ensue to him, and he has a right to assume and rely and act upon the assumption that such care has been exercised.” [Trans. of Record, pp. 233-234.]

The portion of the instruction above quoted clearly was not the law. While it was the master's duty to furnish a safe place to his employees, and in the absence of something to warn them to the contrary, an employee might assume that he had been furnished a safe place, still it was not the law that the servant did not assume a risk arising from the failure of the master to furnish a safe place in which to work or suitable appliances with

which to work, where such failure and the dangers incident thereto were known to the servant, or, by the exercise of ordinary care, should have been known to him. Otherwise, the defense of assumed risk would have been valueless. If the master was not negligent the servant could not recover, regardless of whether he assumed the risk or did not. Section 1970 of the Civil Code, by express wording, provided for the assumption of the risk by the servant of the danger arising from unsafe appliances or places of work being furnished the servant, providing he fully knew and comprehended the same.

We requote the words of the Supreme Court of California:

“Under these circumstances, even if we assume that there was any negligence on the part of defendant in respect to the matters alleged in either count, a complete answer to plaintiff’s action is to be found in the law relative to assumption of risk as it existed in this state at the time he received his injuries.”

Bresette v. E. B. & A. L. Stone Co., *supra*, 162 Cal. 74, 78.

“It is well-settled law that when a servant has knowledge of obvious dangers and perils incident to his employment, or if he, as an intelligent and reasonably prudent man, ought to have observed and to have known them under the circumstances of his service, then he assumes the hazards incident to the business as it is being conducted. *The fact that defendant may have conducted its busi-*

ness negligently in the respects mentioned in no way renders this rule inapplicable to the case, for it had the legal right to conduct its business in its own way, though a different and more prudent method might have prevented the dangers complained of. This is for the reason that if a servant agrees to undertake employment in a business being conducted in a certain way, he thereby assumes all the obvious dangers and hazards.” (The italics are ours.)

Faber v. C. Reiss Coal Co., 102 N. W. 1049, 1050.

“Although conditions have become dangerous through the negligence of the master, from failure to put up guards, and from allowing the floor to get into a state of disrepair, the servant will be understood to have assumed the risk of the employment, if he knew and appreciated, *or ought to have known and appreciated*, the danger resulting from the condition of matters in and about that alleyway.”

Brown v. Hitritz, *supra*, 192 Fed. 528, 530.

See also

Higgins Carpet Co. v. O’Keefe, *supra*, 79 Fed. 900.

The instruction, therefore, that the defendant in error did not assume the risk arising from the employer’s failure to furnish him a safe place in which to work or safe appliances to work with, was contrary both to the statutory declaration and the judicial inter-

pretation of the law. That it was most prejudicial to the plaintiff in error is apparent. The instruction absolutely eliminated the defense of assumed risk and very nearly the defense of contributory negligence. There was no question of assuming any risk other than that of stepping onto the push-table over the dog-roller. If then the jury should determine that such was the only means furnished by which the defendant in error could go upon the push-table, and that his employer was negligent in that respect, then, under the instruction the jury were told that he did not assume that risk.

It is true that the court, in instruction No. VI [Trans. of Record, pp. 236-237], told the jury that if the plaintiff, defendant in error here, fully knew and appreciated the danger of working on or about the machinery, he assumed the risk and could not recover. It is firmly established, however, that an erroneous instruction is not cured by a conflicting correcting instruction, for it is impossible to say which the jury followed.

See

Rathbun v. White, 157 Cal. 248, 253;

Ryan v. Oakland etc., 10 Cal. App. 484, 492-493;

People v. Westlake, 124 Cal. 452, 457;

Quint v. Dimond, 147 Cal. 707, 711-712.

Instructions V and VI, however, were not conflicting. If the machinery were defective and the defendant in error knew that he could not recover, provided the jury should believe that the defective machinery

or appliances were not due to negligence on the part of the plaintiff in error, but if they should believe that the defects in the machinery or appliances were the result of negligence upon the part of McCann's employer in failing to furnish him a safe place in which to work or safe appliances with which to work, then he did not assume the risks incident thereto or arising therefrom. We believe that this was not the law, and that the giving of Instruction No. V was prejudicial to the plaintiff in error and necessitates the reversal of the judgment.

III.

The Court Erred in Giving to the Jury on its Own Motion Instructions Numbered VI and VII.

The sixth and seventh instructions, as set forth in Transcript of Record, pages 236 and 238, constitute, respectively, the third and fourth specifications of error herein (pp. 20-21, *ante*), and the fourth and fifth assigned errors in the assignment of errors. [Trans. of Record, pp. 268-270.] The two instructions were to the effect that the defendant in error assumed the risk of his employment providing he fully knew, understood, comprehended and appreciated the dangers incident to his work. These instructions were not entirely correct. The defendant in error assumed the risk not only of such dangers of which he actually knew, but also all of the dangers of defects of which he should have fully known and comprehended had he been exercising ordinary care and observation. This defect in the instructions was pointed out by specific exceptions thereto and the court nowhere attempted to cure or modify their defects, but gave the jury plainly to understand that before the employee assumed any risk he must have actual knowledge thereof, thus eliminating from the case the question of whether he had full constructive knowledge of the dangers and risk incident to his employment.

The seventh instruction quoted the second paragraph of the amendment of 1907 and told the jury that it applied not only to the issues of assumed risk and contributory negligence, but that it also applied and should be considered by them in determining the issue of the

negligence of the plaintiff in error. We believe in this the learned district court inadvertently fell into a grievous error. The second paragraph of the amendment of 1907 did not deal with the negligence of an employer at all, but dealt solely with the question of assumption of risk and contributory negligence, being, as we have shown, but a statutory declaration of the rules of the common law as announced by both the Federal and state courts.

An employer was not liable merely because machinery or ways or appliances were dangerous. The duty which the law imposed upon him was to exercise ordinary care to keep them safe. This principle was recognized in the fifth instruction given by the district court. Now, it might often happen that a sawmill would be as safely constructed as it was possible, and still be dangerous. Machinery which will saw lumber must necessarily be inherently dangerous and cannot be made absolutely safe. Yet, if the employer had done everything possible to make it as safe as reasonably possible, he would not be negligent merely because some employee, through sheer thoughtlessness, might not appreciate the risk incident to an open, obvious and apparent danger.

Under the instruction as given, the liability of the plaintiff in error was not made to depend upon whether it had exercised due care for the protection of its employees. The question turned wholly upon whether the employees, or any of them, understood the perils to which they were exposed, regardless of whether those perils were open or obvious, and regardless of the amount of care exercised by the plaintiff in error to guard its employees, as far as possible, from those perils.

IV.

The Court Erred in Giving, on its Own Motion, Instruction No. VIII, and in Refusing to Give Instruction No. VI Requested by the Plaintiff in Error.

The giving of instruction No. VIII and the refusal to give No. VI requested by the plaintiff in error, constitute, respectively, the fifth and sixth specifications of errors herein (see pp. 21-23, *ante*), and the sixth and twentieth assigned errors in the assignment of errors. [Trans. of Record, pp. 270-271, 278-279.]

The court, on its own motion, in the eighth instruction told the jury that in determining the question of whether the plaintiff below, defendant in error here, fully comprehended and appreciated the dangers of his surroundings, it was proper for them to consider his youth and experience, and that where a servant was employed of such tender age and limited experience that he did not fully appreciate the danger or the risks incident to his employment, it was negligence to so employ him, even with his own consent, unless he was fully warned and instructed of the danger. [See Bill of Exceptions, Trans of Record, pp. 238-239.]

This instruction stated a correct rule of law in the abstract, but we think it inapplicable to the case at bar for the reasons heretofore given that there was no evidence showing that the defendant in error was of limited knowledge or experience or that he did not fully understand or appreciate the danger incident to his employment. If, however, we are incorrect, it must be conceded that it was, at least, a question of fact for the jury to say whether the dangers

of going up on the push-table over the dog-roller was so open and obvious that any intelligent person of the age and experience of defendant in error must have known and appreciated the same. With this in view, the plaintiff in error, after its motion for a directed verdict had been denied, by its sixth instruction requested the court to charge the jury as follows:

VI.

"You are further instructed that if there were any latent or obscure dangers or defects connected with the machinery in and about which plaintiff worked, that it was then the duty of the defendant to explain such latent defects or obscure dangers to the plaintiff and warn him of the dangers connected therewith. But if you shall find from the evidence [245] that the only dangers connected with the machinery around which plaintiff was employed were in plain view, and were not in any respect hidden, and were such dangers that the plaintiff had full knowledge of and fully comprehended and appreciated, then and in such event no obligation existed on the part of the defendant to warn plaintiff of the danger of his employment, and if injured under such circumstances, then plaintiff cannot recover." [Trans. of Record, pp. 254-255.]

As we have seen, the above instruction correctly stated the law.

"Appellant contends that respondent was guilty of negligence in not warning and instructing him of the dangers incident to his employment as loftsmen. Under the well-settled law in this state and

elsewhere it is the duty of an employer to instruct his employees only when the dangers of their employment are concealed. *No such duty is imposed on him where the dangers are obvious and apparent.* 20 Am. & Eng. Ency. of Law, 94, and cases cited; 1 Labatt on Master and Servant, p. 522, and cases cited. The rule is stated by Labatt in the following words: 'The failure to give instructions, therefore, is not culpable, *when the servant might, by the exercise of ordinary care and attention, have known of the danger*; or, as the rule is also expressed, where he had all the means necessary for ascertaining the actual conditions, and there was no concealed danger which could not be discovered.' " (The italics are ours.)

Mugford v. Atlantic, G. & P. Co., 7 Cal. App. 672, 676, 95 Pac. 674, 676.

See also, to the same effect:

Bresette v. E. B. & A. L. Stone Co., *supra*, 162 Cal. 74, 79;

Berger v. St. Paul M. R. Co. (Minn.), 38 N. W. 814, 815.

"The judge further charged: 'Now, was there anything that this boy needed instruction about in connection with that machine? If you shall say, considering his age, capacity, and experience, that it was necessary for his employer to warn him not to put his fingers in between the cogs, and that if he did so he would be injured, and if the employer failed to do that, that would be a specific act of

negligence for which he would be liable.' We think it is preposterous to say that it was the duty of the employer to warn him not to put his fingers in between the cogs. It might as well be required to warn a boy 12 years old, who was working about boiling water or a hot fire, not to put his hand into the water or the fire."

Buckley v. Guttapercha & Rubber Mfg. Co.,
supra (N. Y.), 21 N. E. 717, 718.

It is manifest that the plaintiff in error was entitled to have the jury instructed that if the dangers were so open and obvious that the defendant in error must have had full knowledge and appreciation of them, then there was no duty to warn him thereof.

V.

The Court Erred in Refusing to Give Instruction Number VIII Requested by the Plaintiff in Error.

The refusal of the court to give instruction No. VIII requested by the plaintiff in error constitutes the seventh specification of error herein (see p. 23, *ante*), and is the twenty-second assigned error in the assignment of errors. [Trans. of Record, p. 279.]

The instruction requested reads as follows:

VIII.

“The proximate cause of an injury in a damage case is that cause which naturally led to and which by a prudent person might reasonably have been expected to be instrumental in producing the injury complained of. In determining whether a certain act is the proximate cause of any injury, the proper test is: ‘Was the injury complained of, of such a character as might reasonably have been foreseen or reasonably have been expected to follow as the result of such an act?’ The rule of proximate cause has the same application in a damage suit in which a minor is plaintiff, as in the case of an adult.”

[See Trans. of Record, pp. 256-257.]

The instruction certainly presented a correct statement of the law and one which it was very material, from the standpoint of the plaintiff in error, to have given to the jury.

“But even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost

foresight. It has been well said that, 'If men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.'

Atchison, Topeka & S. F. R. Co. v. Calhoun etc.,
213 U. S. 1, 9.

"The injury must be the natural and probable consequence of a negligent act, and such as ought to have been foreseen in the light of attending circumstances. Railway Co. v. Kellogg, 94 U. S. 469."

Goodlander Mill Co. v. Standard Oil Co. (C. C. A.), 63 Fed. 400-405, *et seq.*

"But unless it could reasonably have been anticipated that the accident which was the immediate cause of the injury would occur, and he was compelled by the act or omission complained of to occupy that place, the injury would, in no legal sense, be the consequence of the act or omission. And it seems to us that there was no evidence of the existence of either of these facts."

Handelun v. Burlington C. R. & N. R. Co. (Ia.),
32 N. W. 4, 6.

“The proximate cause of an injury cannot be referred to negligence unless it appears that such injury was the natural and probable consequence of such negligence, and that it ought to have been foreseen in the light of attending circumstances.

* * *

“The elements of natural and probable result, and that the result ought to have been foreseen by a person of ordinary intelligence and prudence, in the light of attending circumstances, are distinguishing characteristics between mere accident, or negligence, from which no legal responsibility follows, and actionable negligence. If one be injured by the act of another, and such elements are not present, it is referred to natural imperfections to which the mass of mankind are customarily subject, and the risks incident to the human existence and human activity, which, in the associations of life, all members of society are supposed to assume.”

Deisentieter v. Kraus-Merkel Maltin Co. (Wis.),
72 N. W. 735, 737-738.

“The question is not whether it was a *possible consequence*, but *whether it was probable, that is, likely to occur, according to the usual experience of mankind*. That this is the true test of responsibility applicable to a case like this has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience.”

Stone v. Boston & Albany R. Co., 171 Mass. 636,
638, 51 N. E. 1, 3.

Had the instruction requested been given the jury doubtless would have concluded that the plaintiff in error was not negligent. In the first instance, as we have seen, it was not intended that any employee should go upon the push-table. Secondly, the defendant in error had gone there over the dog-roller without injury a number of times, and if he did not anticipate injury, why should his employer? As we have seen, it was admitted by the defendant in error that there were lumber buggies which usually stood along the push-table, on which an employee might mount. There was also evidence that the men on the loading-table, by signal, could and sometimes did stop the operation of the mill, and the jury might very easily have assumed that an ordinarily prudent man, in the situation of the plaintiff in error, might reasonably have assumed that his employees would not attempt to go onto the push-table over the dog-roller; that when it became necessary for any of them to go upon the push-table they would either climb upon it by way of the lumber trucks, or, if they could not use the trucks, that they would stop the mill before attempting to cross the dog-roller.

No similar instruction to that requested and refused was given. It stated a correct rule of law and one that was very essential to plaintiff in error to have given to the jury. The refusal of the learned District Court to give the instruction prevented the plaintiff in error from having its side of the case considered by the jury, and we believe that a reversal is the only remedy.

VI.

The Court Erred in Declining to Give Instruction Number XI, Requested by the Plaintiff in Error.

The refusal of the court to give instruction No. XI requested by the plaintiff in error constitutes the eighth specification of error herein (see pp. 23-24, *ante*), and the twenty-fifth assigned error in the assignment of errors. [Trans. of Record, pp. 281-282.]

Two acts of negligence were charged by the defendant in error: one, that his employer furnished him an unsafe place in which to work; two, that it was negligence in failing to warn him thereof. It is, of course, impossible to tell which theory, if either, was adopted by the jury as a foundation for their verdict. As a basis for the averment of negligence in failing to furnish him a safe place in which to work, the defendant in error, in the fourth paragraph of his second amended complaint, charged that when a jam of lumber occurred, it was necessary for him to go upon the push-table, and that the only means provided for him going there was over the dog-roller. [Trans. of Record, 46-47.] All of the allegations of negligence were denied by the answer of the plaintiff in error [Trans. of Record, pp. 68-80], and by an amendment to the answer, plaintiff in error specially alleged that there were other and safe means for the defendant in error to mount to the push-table.

Thus, the question as to whether the defendant in error was furnished no other means than mounting over the dog-roller was placed in issue by the pleadings and also by the evidence. Plaintiff in error, at the trial, contended and still believes that the evidence con-

clusively demonstrated, first, that no employe was expected to go upon the push-table without stopping the machinery; second, that there were two ways of going upon the push-table other than over the dog-roller, both of them perfectly safe. If such were the case, of course, the charge of negligence in failing to furnish a safe place for defendant in error to work was destroyed.

The eleventh instruction requested by the plaintiff in error and refused is as follows:

XI.

“The jury are hereby instructed that if they shall find from the evidence that plaintiff had knowledge of the fact that there were two ways by means of which he could have climbed upon the push-table—the one way being to step over the spiked roller and the other way being to climb over the side of the push-table, by means of the lumber buggies; the first way being extremely dangerous and so known to him to be, and the other way safe and known by him to be so. And if you shall believe from the evidence that he voluntarily chose the dangerous way of going upon said push-table, when there was no occasion or necessity for so doing, and in so doing received the injury of which he complains, that he cannot hold the defendant responsible for an injury which directly resulted from his voluntary and unnecessary choice of the more dangerous of the two ways of doing the work he attempted to do.”
[Trans. of Record, p. 259.]

At the time of the happening of this accident, it was the universally established law that where there were two ways for a servant to perform a task, one safe and

the other dangerous, and the servant voluntarily chose the dangerous method, he could not recover. Such necessarily must have been the law. Where an employer furnished a safe way in which to work, he should not be liable merely because, from the necessary construction of the machine there was another way by which the servant could do his work which was extremely hazardous.

Argument, however, is not necessary, for the rule announced in the instruction requested was the settled law of the state of California.

“The evidence shows beyond any question that the defendant had provided a safe and secure way to a closet for the employees of the car machine shop from the stairway on those premises up and along the upper story of the building. Having done so, it had done all that the law cast upon it, and it was the duty of the deceased when occasion required to take that safe way. When a safe way is provided by an employer and a dangerous way exists, if an employee chooses to take the dangerous way and is injured, he is guilty of contributory negligence as a matter of law. This is the rule universally recognized. As said: ‘Where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover. An employee must take care of himself as well as the master must take care of his duties and his employees. These obligations are mutual, and it is the law that if a man

voluntarily puts himself in a dangerous position, does so unnecessarily when there are positions in connection with the discharge of his duties which are safe which he can be placed in, he cannot recover damages for the injury to which he has contributed by his own negligence.' (Bailey on Personal Injuries, secs. 1123, 1124.) In *Hoofman v. American Foundry Co.*, 18 Wash. 287 (51 Pac. 385), the rule is expressed: 'Where there are two methods by which a service may be performed, one perilous and the other safe, an employee who voluntarily chooses the perilous rather than the safe one cannot recover for an injury thereby sustained.' And in *Dandie v. Southern Pacific Co.*, 42 La. Ann. 686 (7 South. 792): 'The servant cannot recover where his own want of care has contributed to the injury. If among the different modes of performing a duty he selects the most dangerous, which unnecessarily exposes him to danger, he is responsible for the selection.' "

Douglas v. Southern Pac. Co., 151 Cal. 242, 250-251.

See also the great number of authorities cited in support of the decision, also:

Leard v. International Paper Co., 60 Atl. 700;
Covington v. Smith Furn. Co., 50 S. E. 761.

"When an employee has his choice of two ways in which to perform a duty, the one safe, though inconvenient, and the other dangerous, he is bound to select the safe method; and if, instead of so doing, he elects to pursue the dangerous way, and

is in consequence injured, he is guilty of such negligence as will bar an action for damages against the master.”

Atchison, T. & S. F. Ry. Co. v. Rudolph (Kan.),
99 Pac. 224, 228.

The same rule has been repeatedly recognized by the federal courts.

“Where there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is a want of ordinary care for him to select and use the more dangerous method.”

Gilbert v. Burlington, C. R. & N. Ry. Co., 128
Fed. 529, 534.

See to same effect and announcing the same rule:

Erdman v. Deer River Lumber Co., 182 Fed.
42, 45;

Morris v. Duluth etc. Co., 108 Fed. 747, 749;

Gowen v. Harley, 56 Fed. 973, 983.

There was more than sufficient evidence to justify the court in giving the instruction requested. In the first instance, as we have seen from the testimony already quoted, the defendant in error could have stopped the machinery before attempting to go upon the table. Indeed, Coffin, a fellow employee, testified that he was signaling the trimmer to stop at the time McCann attempted to go upon the table [Trans. of Record, pp. 212-213]. In addition to this the evidence clearly indicated that there were stationed at each side of the loading-table trucks which were kept loaded with lumber and upon which any employee could mount with safety to the push-table without going over the dog-roller.

The defendant in error himself said:

"At times I mounted this push-table from those cars or trucks. I don't know exactly why I did not mount from one of those trucks on the day I received the injury unless, if I remember rightly, there was a truck there, a load so high if I once got upon it I would either tip down one end and dump off all the load, or pull half the load off on me if I jumped to get up on top. That is a kind of a recollection or impression, I suppose." [Trans. of Record, pp. 145-146.]

"There was a truck alongside the push-table at the time this accident occurred; it was standing alongside the push-table; I was standing alongside the carrying-table." * * * [Trans. of Record, p. 123.]

"I did not state positive that it was so piled with lumber that I was afraid the lumber might fall off. I said, 'If I remember rightly it was that high.'" [Trans. of Record, p. 156.]

"The most convenient way was to get up on table B." [Trans. of Record, p. 124.]

Mr. Kilty, foreman for the plaintiff in error, in relation to this matter, testified:

"The workmen generally mounted the platform by two trucks on the inside. * * *

"There generally were two trucks, one on the inside. We replace them both at the same time; they came in for loading; the loading crew generally done this replacing. * * * The height to which they were generally loaded depended on how fast the lumber came, and if we had cars to load them into quickly, and a great many things; they would go from two feet to

three feet high; that is, from 1,500 to 2,000 feet on a truck, 1,500 feet would be an ordinary load. The height would not make them fall off; it was the faulty loading that would make them fall off. The height would not cut any figure; you can load it as high as you please and not have it slide. * * * The boxing of the shaft which revolved the rollers on the outside had guards on." [Trans. of Record, pp. 185-187.]

As before observed, there was also evidence that the defendant in error could have stopped the trimmer or the entire mill before attempting to pass over the dog-roller. In fact, as we have seen, he testified that he, on previous occasions, had sometimes stopped the trimmer. [Trans. of Record, p. 155.] It is therefore apparent that the jury might easily have concluded that there were one or more perfectly safe ways maintained by the plaintiff in error by which the defendant in error could have gone to the push-table and that such fact was known to the defendant in error; that the defendant in error knew that lumber trucks were kept beside the loading and push-tables for the very purpose of allowing him, or any other employee, to reach the push-table; that when such means, for any reason, could not be used, that the employees could stop the trimmer or the mill.

In addition to this there was still another way in which the defendant in error could have gone, without injury, upon the table. Looking at the photograph on page 263 of the record it can be seen that at the end of the dog-roller there is an iron pipe which extends upward in the air. It must be borne in mind also that there was between the carrying-table and the loading-

table a platform, not shown in the picture, and it is perfectly apparent that the defendant in error could have stepped upon that platform, taken hold of the pipe and so stepped upon the table without stepping over or across the dog-roller. The same condition will be seen by examining the model, the wire at the edge of the table representing the pipe. [Trans. of Record, p. 171.] This was sufficient evidence alone to have necessitated the instruction. In regard to this the defendant in error testified:

"I identified on the photograph a piece of iron pipe that extended up from the corner of the push-table and to the end of the roller. That was there at the time of the accident. It was about three-quarter inch pipe, something like that.

"Q. Was it solid, put in securely? [165] A. There was a hole in there and it was down in that hole. I never took hold of that pipe when I got up.

"Q. Couldn't you easily have gone up on the push-table from the outside of the roller by putting your hands upon that pipe; could you not have stepped upon the projection there that covered this revolving shaft and gone up that way, without being in danger of getting your foot into the roller? A. Well, being it is easy,—I didn't form any conclusion; I most likely didn't observe it at the time; that pipe did not extend up very high. The pipe extended up about two feet; I was two feet below here, so the pipe stood up at least four feet from the level where I was standing." [Trans. of Record, pp. 171-172.]

Since the plaintiff in error introduced evidence tending to show that there were two ways which it main-

tained by which its employees could go to the push-table when necessary without stepping over or coming near to the dog-roller, it was entitled to the instruction requested. No similar instruction was given by the learned court; nor was the jury anywhere informed that if the plaintiff in error, with the knowledge of the defendant in error, maintained a safe way by which he could go to the push-table, that defendant in error could not recover if he voluntarily chose a dangerous way.

Under the instruction as given, the jury were warranted in finding that the plaintiff in error was guilty of negligence even though they should believe that there was maintained by it one or more perfectly safe ways for its employees to go upon the push-table and that such ways were known to the employees and known to be safe, providing the jury also found that there was another way by which employees could go upon the table which was dangerous and was known to them to be dangerous.

We believe further argument is unnecessary to show that it was error for the court to refuse the eleventh instruction requested, and that such error was extremely prejudicial to plaintiff in error and alone necessitates reversal of the judgment.

Conclusion.

The case may be briefly summarized:

The defendant in error, a boy seventeen years of age, man grown, and doing a man's work, was employed in the sawmill of the plaintiff in error; upon entering that employment he undertook to study, and did study, the machinery in the mill. For two weeks he worked in front of the carrying-table and by the side of the push-table. During that time he observed the lumber coming in a continual stream upon the two tables. Every moment of the day he saw the rollers in the push-table in rapid revolution, propelling the lumber forward to the dog-roller; he saw the teeth of the latter fasten in the lumber and hurl it from the push-table to the carrying-table. He knew that the "X" board was within an inch or so of the dog-roller; he knew that the latter was armed with spikes, and, driven by the motive power of the mill, was making at least a hundred revolutions a minute. He knew that unless the mill or the trimmer was stopped the lumber would be sent in a continual stream upon both tables. He knew that when he was upon either his feet were liable to be struck by the swiftly moving lumber and knocked from under him. He knew that there was a way by which he could stop the mill. He knew that without stopping the mill he could stop the trimmer and thus arrest the lumber from coming upon either table. He had previously stopped the trimmer upon several occasions. He knew that trucks loaded with lumber stood beside the push-table and he had mounted to the push-table by these trucks and had seen others do so, but he thought that it was more "convenient" to step over the dog-roller.

On the day of the accident he observed a stick catch in the skids and feared a jam would result. He thought about stopping the trimmer, but decided that it was an unnecessary precaution. With the machinery running at full speed, and knowing that lumber would be pouring like a torrent over the dog-roller, he attempted to step or jump across it to the push-table.

There was not a single peril of his situation which was not open, obvious and apparent. The learned trial court, declined, however, to hold, as a matter of law, that he assumed the risk of his employment, or was guilty of contributory negligence and submitted the questions to the jury, instructing them that the employee did not assume any risk arising from the negligence of the employer; that in order to establish the defense of assumed risk, it must be shown that the employee had actual knowledge of the dangers of his work, thus allowing him to recover if he did not have actual knowledge of the danger of his work, although his failure to have such knowledge was the result of his own gross inattention and lack of care, and although there was no evidence that the defendant in error was not of ordinary intelligence and did not fully understand the operation of the machine. The learned court further charged the jury that in determining the issue of whether the plaintiff in error had used due care, they should consider whether the defendant in error fully understood the dangers of his situation, thus making the question of the care, or lack thereof, of the plaintiff in error depend upon whether the defendant in error appreciated the dangers to which he was exposed,

quite regardless of whether his employer had used due care in furnishing him a place of work. The learned court also instructed the jury that if they should believe that the defendant in error did not fully comprehend or understand the perils of his situation through his youth or inexperience, that it was the duty of his employer to have fully instructed him of such dangers and perils, and refused to charge that the employer was not required to instruct its employees of obvious, open and apparent dangers; also the learned court further refused the request of the plaintiff in error to instruct the jury to the effect that it could not be held negligent, except for such result as might reasonably have been foreseen or anticipated.

Although there was a great deal of evidence to show that there were two perfectly safe ways by which the defendant in error could have gone upon the push-table without crossing the dog-roller, the learned court refused the request of the plaintiff in error to charge that if the jury should believe that there were two such ways, one dangerous and the other safe, and so known to him, and he voluntarily chose the dangerous way, that he could not recover.

We submit that the record shows:

1. That the learned trial court erred in denying the motion for a directed verdict in favor of the plaintiff in error.

2. That the cause was submitted to the jury upon improper instructions and the jury were not properly or correctly charged as to the law governing the relation

of employer and employee as it existed at the time of this regrettable accident.

For each and all of the reasons which we have urged, we respectfully submit that the judgment must be reversed.

All of which is respectfully submitted.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BENSON LUMBER COMPANY, a cor-
poration,

Plaintiff in Error.

VS.

H. C. McCANN, by Jesse F. McCann,
his guardian ad litem,

Defendant in Error.

Brief for Defendant in Error

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Filed

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F. D. Monckton,

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STATEMENT OF THE CASE.

This action was originally brought in the Superior Court of the County of San Diego, State of California, on July 30, 1908, to recover damages for personal injuries sustained by the defendant in error hereinafter referred to as the plaintiff, on July 30, 1907.

It was removed to the then Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, in January, 1909, but was not reached for trial in the District Court of the United States until September 12, 1913, more than six years after the time of the casualty. The injuries were received by plaintiff while employed in the saw-mill of the plaintiff in error, hereinafter referred to as the defendant.

The cause was tried upon the second amended complaint and the amended answer thereto, and an amendment to said answer (Trans., pp. 43 to 51; 68 to 82). The complaint, in paragraph 3 thereof, described the general construction and operation of the mill which is substantially admitted in the answer.

In brief terms, the work of the mill consisted of continuous, connected and contemporaneous processes of converting logs into lumber, in the course of which the lumber, after having passed through the preliminary stages was conveyed to a trimmer table inside of the mill, which sawed it into the desired lengths; and as sawed, the revolving devices in the trimmer carried the manufactured lumber and dumped it sidewise upon skids, making a slide outside of the mill leading downward to a "push table" in the surface of which were revolving rollers, including a roller studded with "dogs"; *i. e.*, projections or spikes; these rollers carried the lumber at right angles from the direction in which it was received from the skids until it dropped two feet downward upon the loading, otherwise called the carrying table; from which the lumber was taken and loaded on trucks by the employees to be wheeled away.

THE ISSUES.

The plaintiff in substance alleges that on July 30, 1907, he was of the age of 17 years and 3 months, and was in the employ of the defendant in thus loading lumber.

That by reason of the defective condition and operation of the "slide" it failed to properly carry the lumber down upon the push table, by reason of which accumulations, jams and clogs of the continuous stream of lumber frequently occurred.

That the defendant required of plaintiff, as part of his employment whenever such jams occurred, to mount said push table while said rollers therein were in operation and

lumber was being delivered in a continuous stream from the inside of the mill to disentangle and loosen such jams, and see that the lumber was kept moving down the slides, and on and from the push table upon the loading table. That this work was required to be done while the mill, including said rollers in the push table, was in full operation, amid the great noise and confusion attendant thereto, and without interruption of the stream of lumber from the mill; that the work and labor of loosening and releasing the lumber required extreme and desperate haste and the exercise of great and violent muscular exertion, and under the circumstances was of an extremely distracting character, and particularly unsuitable for a youth of plaintiff's age and experience. That by reason of the said conditions the said push table was an unsafe and dangerous place on or about which to work, and the work itself made perilous and unsafe, as defendant knew.

That with full knowledge of plaintiff's youth and inexperience the defendant failed and neglected to warn plaintiff of the dangers and perils incident to said work, and carelessly, negligently and recklessly required plaintiff to expose himself to said perils and dangers.

That defendant failed to use ordinary or any care to provide a safe way or appliance for plaintiff's use in mounting said "push table", and had provided no other means for mounting upon said "push table" than to step up and upon the same from said "carrying table" over said "dog roller" revolving at the end of said push table, next to said "carrying table". That said "push table" was defective and unsafe in that defendant did not have or provide a reasonably safe means to protect plaintiff from said dog roller.

That on said July 30, 1907, while plaintiff was so employed, a jam of lumber occurred between the skids of the slide and on the push table; that while plaintiff, in the

course of what was required of him in said employment, was mounting upon said push table to disentangle the lumber which was so clogged, jammed and piled up on said push table, plaintiff's right foot was caught by said dog roller and he was thrown down upon said push table and his foot bruised and mangled, requiring its amputation.

The amended answer denied all the allegations of negligence, and makes denials that plaintiff "was required to go upon said push table" (Tr., p. 70); avers that the said push table was not a place on which any employee or person whomsoever was required or expected or permitted to work (Tr., p. 71); alleges that said push table "was as safe as it was possible for a machine of its nature and kind to be" (Tr., p. 71); "denies that plaintiff was expected, permitted or required by defendant, or any of its servants, agents or employees to mount or go upon said push table" (Tr., p. 73); states that defendant, "inasmuch as said push table was not a place where work was to be done, or which it was expected would be mounted, denies that any duty rested upon it to provide any means, way or appliances for the use of plaintiff or any person to mount or go upon the same" (Tr., pp. 73-74); "denies that at said time * * * the said outside platform or 'push table' was a place for plaintiff to work in, or in which he was expected, permitted or required by defendant to work, whether unsafe, as stated in the complaint, or at all" (Tr., p. 74). The defendant further alleges "that it had instructed said plaintiff not to go on, over or upon the said push table, and had not only warned and instructed him not to go on said push table, but had ordered him not to go on said push table; that there was no necessity of plaintiff's getting on said push table" (Tr., p. 76).

In line with these reiterated denials, and averments is the admission (Tr., p. 70):

“And defendant further answering admits that it had provided no means for mounting on said ‘push table’ and alleges that such push table was not to be mounted by any of the defendant’s servants, agents or employees at any time, while said mill was in operation.”

Reference is made to these repeated denials and averments to the effect that the push table was never to be mounted while the mill was in operation, and that there was no necessity for so doing; and the admission that no means were provided for mounting it, to call attention to the significant change in the attitude of defendant on this subject by the amendment to the answer made at the trial, September 12, 1913 (Tr., p. 82).

This amendment strikes out all that part of paragraph 4 of the amended answer, including all the matter in the last clause of the same commencing with the words above quoted, to-wit: “and defendant further admits that it provided no means for mounting on said push table” (Tr., p. 70), and includes in the stricken portion the allegation that the push table was not to be mounted “while said mill was in operation”; and substitutes itself in place of the matter stricken out.

In this amendment occurs this language in its context:

“That it was the custom of the employees *when-ever it became necessary to mount said push table*, to mount the same from the lumber buggies, which was a safe, easy and convenient means of mounting said push table.”

This amendment, we submit, made a vital change in the theory of the defendant, both by what it struck out and what it impliedly admits.

Whereas the original amended answer denied that there was any necessity to mount the push table, this amendment concedes it. Whereas the original amended answer con-

tained the allegation that the push table was not to be mounted while the mill was in operation, the striking out of that allegation in connection with the allegation conceding the necessity for mounting, concedes that such mounting was to be done while the mill was in operation.

Instead of the allegations in the original amended answer that no employee was permitted to mount the push table, the defendant by the amendment alleges the "*custom of the employees whenever it became necessary to mount said push table to mount the same.*"

Thus all the elaborate denials that defendant did not require or expect its employees to mount the push table while the mill was in motion is abandoned, and all that was left in issue under the denials in respect of this extraordinary requirement was whether, in making it, defendant used ordinary care commensurate with the circumstances and the age and experience of plaintiff to make it safe for plaintiff to mount the table to loosen jams and accumulations of lumber.

In addition to such residuum of denials, the amended answer pleaded as defendant's affirmative defenses, that plaintiff assumed the risk of his injury; and that he contributed to it by his own negligence.

The amended answer also alleges as a distinct defense that plaintiff's injuries were caused wholly or in part by the negligence of his co-employees. But no evidence was introduced in support of this defense and no insistence was made upon it at the trial.

The trial was had before a jury upon the issues as to the negligence of defendant, as to the defense of assumption of the risk and as to the defense of contributory negligence.

The verdict having passed for plaintiff, the defendant brings this writ of error herein.

THE CASE AS DEVELOPED BY THE EVIDENCE.

The case is entirely free from any objection to testimony or evidence and the record contains no assignment of error in that behalf.

The printed brief for defendant begins the argument with the following statement:

“We feel that it is a very debatable question whether there was any evidence to warrant the implied finding of the jury that plaintiff in error was guilty of negligence. We do not discuss that issue however.”

Since debatable questions of fact must be resolved by the appellate court in favor of the verdict, it would seem that this amounts to a virtual concession that the defendant was negligent in all the respects which any evidence tended to prove.

Notwithstanding this apparent concession, that the verdict is justified in finding defendant guilty of negligence, we deem it proper, especially having regard to the vital bearing of negligence on part of the master upon this defense of assumption of the risk, to follow the suggestion of the author of *Labatt's Master & Servant*, p. 3113, 2nd edition, where he says.

“But the present writer is strongly of the opinion that, in practical litigation, the method of inquiry which will produce the most equitable and satisfactory results is that which fixes attention first of all upon the question of the defendant's negligence.”

To this end, it seems desirable to refer to the evidence including that respecting the “trimmer table”, the “push table”, the “carrying” or “loading table”, and the “loading platform” with which the ordinary and extraordinary work required of plaintiff brought him in relation. The exhibit 1 in connection with the photograph furnished by defendant, made Exhibit 2, pp. 262-263, of the transcript,

and set out on pp. 7 and 8 of the brief, assist in comprehending their relation taken in connection with the description of the *locus in quo* given by McCann, pp. 94-101, 103-108. The trimmer was entirely inside of the mill and the letter "E" on the plat simply indicates the east wall of the mill behind which the trimmer was located. In the photograph "E" simply marks the one skid nearest the south end of the push table.

This trimmer table was 32 feet in length, east and west, by 12 feet in width. Its easterly side, over which the lumber was discharged upon the slides was in an opening in the east wall of the mill at a height of not less than 8 feet 7 inches above the level of the loading platform, marked "F" in the two exhibits; and 5 feet above the level of the carrying table "B", and 3 feet above the level of the push table; it sloped from the east wall of the mill for its width of 12 feet inward and downward within the mill. In this trimmer there reached endless chain lumber carriers from west to east. The workman who operated the trimmer had his location at the southwest corner of the trimmer lower than the lower end of the trimmer (Tr., p. 97-98). The east side of the mill below the trimmer was boarded up so that it is apparent, as the testimony shows, that the operator could not see the lumber after it was delivered over the trimmer to the skids leading to the push and carrying tables (Tr., p. 98, 223). Nor could he see anything of jams on the push or carrying table. He was out of sight from the place where the plaintiff and his associates worked (Tr., p. 223). The operator of the trimmer table could check for a limited time the stream of lumber coming to him from passing over the trimmer. But there is nothing to show that he had any control of the motive power which operated the carriers in the trimmer or the rollers in the "push table". This power was applied from the central machinery in the inside of the mill. When a

jam got so bad that he had to be signalled to stop the stream of lumber he could not be made to hear by shouting on account of the noise, but nothing short of mounting the carrying table and throwing a block or some such object to him would attract his attention (Tr., p. 129-139). The function of the trimming table was to saw the lumber of the lengths in which it came from the log as it passed over that table into merchantable lengths by disappearing saws worked by treadles; the longest pieces fell on the push table and the shorter ends trimmed off fell upon the carrying table (Tr., p. 98-99).

That any reasonable or adequate method of attracting the attention of the operator of the trimmer to check the stream of lumber over the trimmer was provided cannot be claimed under the testimony. Indeed, it is apparent that it was not expected or intended that any attempt should be made to stop his work, and that the utmost exertion was required of the loaders to avoid checking up his work, for this led to the accumulation of lumber on him (p. 130). Kelty testified (Tr., p. 189-190):

“I couldn’t say that I ever did see the trimmer stopped to clear away a jam on the push table. It would be a good thing to do it. I couldn’t say I did see it stop for the purpose of clearing the push table.”

The surface of the push table “A” was 5 feet 7 inches above the level of the loading platform “F”. Its length was 17 feet 11 inches and its width 4 feet. It had in its surface five iron rollers, which revolved from north to south, each of 6 inches diameter, one at the north end; one at the south end, which was studded with dogs or spikes, and the other dividing the intermediate space between the two center ones. They rose an inch above the surface of the table and were given from 100 to 150 revolutions per minute, the motion being communicated to them by being geared to a revolving shaft of the same velocity two inches

in diameter, extending along the east edge of the table for its whole length within about six inches of its top. The upper surface of this shaft was for more than half of its diameter exposed and uncovered. It was protected by a board at its under side but not at the top (McCann, Tr., p. 152, 171; Kelty, p. 195); Exhibit 2, p. 263; Coffin, contra, p. 223; and see photograph.

This push table at the time of the casualty was removed three feet east from the east wall of the mill and the space between the west side of the push table and the transverse opening in the east side of the mill was bridged at the time of the occurrence by six skids of lumber set up edgewise (Diller, p. 174), which extended from the western line and surface of the push table up to the eastern edge of the trimmer in the wall of the mill, 3 feet vertically above; this made the inclination of the skids about 45 degrees (Tr., p. 106). Below the space bridged over by the skids was a pit (Tr., p. 118). Along the east edge of the surface of the push table for its whole length was a 4-inch wide guard of planking extended for a height of 2 inches above the surface of the push table (Tr., p. 104, 174). The purpose of this was to keep the lumber ejected by the revolving chain carriers of the trimming table over the upper edge of the trimmer and down the skids on the push table from going over the east side of the table and the revolving shaft there (Tr., pp. 104, 164-165). Jams and the force of lumber coming down against this rail had the effect to bend and gouge it out.

The force with which the sticks and pieces of lumber came down these skids is variously described by the witnesses. "They came down rather swiftly"; "with considerable force" (McCann, tr., p. 164-165). "That timber comes down there very viciously" (Coffin, Tr., p. 216). The skids were gouged out on the surface and broke off

at the ends. As shown in the photograph they show wear (Kelty, Tr., p 198; Coffin, Tr., p. 219).

The design of this push table was to work automatically in transporting the lumber which was precipitated down the skids from the trimmer table at right angles from the direction in which it was received, southward and land it upon the carrier table.

The carrier table was located with its nearest edge two feet south of the south edge of the push table and two feet lower in elevation. It extended east and west and was provided with flat link chain carriers revolving in its surface in that direction and therefore at right angles to the direction in which the lumber came from the push table. Upon this carrier table there were precipitated the shorter pieces of lumber over skids from the trimmer at the same time that it was receiving lumber from the push table so that the two streams of lumber met on the carrying table (Tr., p. 98). The function of this table was also to work automatically in carrying the lumber eastward until it was held up by a timber nailed across it at a distance on a line as far east as the loading platform extended, which was ten feet from the push table. The checking of the movement of the lumber at that place was a temporary arrangement, as the construction of the carrying table then going on contemplated that it should be extended to a length of 125 or 130 feet (Diller, p. 174). But in its uncompleted condition at the time of this casualty the plaintiff and his associates were required to handle the whole output of the mill upon what was termed the loading platform.

The loading platform is marked F on the two exhibits. It extended from the line of the carrying table northward along and beyond the east side of the push table adjoining. It was only ten feet wide east and west, and as the witness for defendant, Kilty states (Tr., p. 197) "It was a rather

confined and congested place to handle all this lumber and at the same time to have the men keep watch of the push and carrying table," but, he adds, "it answered the purpose."

The significance of the fact of this uncompleted condition of the carrying table at the time of the casualty lies in the fact that the plan of construction contemplated the removal of the lumber loaders entirely away from all care for or oversight of the operation of the push and carrying table, the loading and sorting of the lumber being done when it was completed in the ample room afforded by the extension of such table for its 125 or 130 feet. After the completion, the oversight of the push and carrying table and skids in their completed installation and adaptation was committed to a man distinct from the loaders and made an entirely separate employment, and the loading table was abandoned as such (Tr., pp. 93, 99, 105, 174-5).

The loading table was depressed 5 feet 7 inches below the surface of the push table, and 3 feet and 7 inches below the surface of the carrying table. The space between the push table and the carrier table had a small platform at the height of 2 feet 4 inches from the floor of the loading platform F (Tr., pp. 112, 141) with a small step leading from F to it for the purpose of facilitating getting up on to it (Tr., p. 177). From this small platform to the carrying table was 1 foot 3 inches.

This mill commenced operation in May, 1897, and was, therefore, new. The plaintiff had been employed the earlier two weeks, about five weeks before his injury, as a laborer to load lumber on two-wheeled push carts after it came from the mill. During that time the mill was without a push table or carrier table, but the lumber was sent from the trimmer over skids to the loading platform (Tr., p. 180). Plaintiff was then laid off for a week or more during which time the defendant installed the push table

and carrier table to receive and deliver the lumber from the trimmer within reach of the workmen to be loaded on trucks for removal. Plaintiff was re-employed to do the same work (Tr., 109, 130-131, 180). Defendant's outside foreman, Kilty, describes the work assigned to him as follows (Tr., p. 179):

"He was one of four men to take the lumber as it came from the mill and delivered on the carrying table there, as it has been named, to load it on trucks. I told him what to do."

That this newly installed machinery was expected to work automatically in bringing the lumber within reach of these four men without necessity for having their defective operation supplemented by the men mounting upon the push and carrying table is clear. Kilty says (Tr., p. 193):

"It wasn't anybody's regular business to get up there. *When the thing was built it wasn't intended that anybody should get up there.*"

The original amended answer plainly went upon the theory that what was so intended, was what the machinery was capable of accomplishing, without requiring anyone to mount these tables to help out their very defective operation which resulted in all sorts of jams, cloggings and eccentricities in their work of conveying the lumber, which if not relieved would call for stopping the whole operation of the mill.

But as recognized by the amendment to the answer at the trial the necessity for relieving the recurring results of this defective functioning soon developed when the work began after the installation of the new machinery.

This necessity arose from the defective installation of the push table and the defective construction of the skids leading to it. The skids were of wood without any bear-

ing surface of iron (Tr., p. 167). As Kilty says (Tr., p. 198):

“These skids were of wood 2x6 and were not shod with iron at the time this accident occurred, and all sorts of lumber came down on them; some heavy lumber; all kinds of lumber—everything that came down from the mill. Naturally it very soon gouged out the surface of these skids and broke off the ends. It will wear—looking at the photograph, those skids show wear. The irons were put on them to preserve them” (that is after the casualty).

The natural consequence of this condition of the skids was to carry and deliver the lumber in all sorts of eccentric ways and to defeat the automatic action of the skids and push table. Sometimes a stick of lumber would be thrown so that it stood upright between the skids with one end in the pit and the other end sticking above the skids, which created a jam. (Tr., pp. 117-118). Coffin testifies that at the time of the casualty a 2x4 or a 2x6 there stood and was making a jam as well as that a board had lodged on the table. (Tr., p. 222). The defective operation of the machine thus installed as shown by the undisputed testimony, caused a necessity for some agency to mount the table to relieve the jams. This labor and risk was an extra-hazardous work, superadded to plaintiff's proper work and imposed on him by defendant.

It was in fact a period of experimentation with the installation of this new machinery. The defendant experimented with it at the expense of the lumber loaders and particularly of plaintiff, the youngest and most willing worker, emulous of approving himself to his employer, under whose eye and insistence he repeatedly exposed himself to the lurking danger that led to his injury, which we hereafter more fully discuss.

So we have the testimony of the witness for defendant Kilty, who cannot be accused of any effort to favor the

plaintiff. We submit that his testimony, which we are about to quote, justified the court in submitting it to the jury, and supports the implied finding by the verdict of the truth of the allegations in the complaint that defendant imposed on plaintiff the requirements to mount the push table while the mill and rollers were in operation whenever jam and stoppages of lumber made that necessary. Kilty testified (Tr., pp. 192, 193):

"I don't believe there is anybody that could tell about how many times during that two weeks that the machine was set up that the men had occasion to get up on the push table. I didn't keep track of it. *It would be a good many times.*

"I saw Mr. Coffin and the young man upon that push table and was up there myself. Also saw the scaler up there sometimes, the man that scaled the lumber, that tallied it; he would happen to come along there from some car and would punch it out. It wasn't anybody's regular business to get up there. *When the thing was built it wasn't intended that anybody should get up there. The men did go up frequently, as they found they had to because the lumber would go wrong,* something would happen that would cause it to stop, and if they didn't get up there and release these jams the lumber would eventually pile up so it would have to be taken off and loosened. *Certainly, they had to remove those jams;* I don't say they did not have to get up on that platform. I haven't said that; *it was necessary to go up there on the push table.* I did not see them every time it was necessary to get up there; I was not there all of the time. It was the place of these four men to look after these jams. If that jam occurred or trouble occurred on the carrying-table, it wasn't anybody's duty to see to that; these four men had to take care of all the lumber that come down there to see that it was put on those trucks."

Kilty also says (Tr., p. 196):

“These men had to do all the work of loading this lumber upon these carts, *and it was their duty to see that the lumber was not jammed on the push table, or the carrying table.*”

This testimony above amply supports the position that after the plaintiff was employed merely to handle and load lumber in which there was no risk, there was imposed upon him the *extra-hazardous* requirement to mount the push and carrying tables, and expose himself to all the risks of injury from the moving machinery and descending and shifting lumber of all sizes from timbers 8x8 inches to inch boards, in order to relieve the consequences of the defectively working machinery.

But on this point there is absolutely no conflict in the testimony. That Kilty denies that he gave an explicit order to plaintiff to mount the push and carrying tables to release a jam, is of little consequence, in view of the plaintiff's testimony and the uncontradicted evidence that both he and Kilty and the superintendent of the mill expected and required it to be done and saw that it was done.

We submit, further, that the evidence fully justified the submission to the jury of the issue made upon the allegation that this extra-hazardous required work beyond the scope of the contract of hiring, was extremely severe and distracting, and particularly unsuitable for a youth of plaintiff's age and experience. In the first place it super-added just that much to the regular and ordinary work for which plaintiff was employed. And in the next place the very nature of disengaging a jam while the stream of lumber continued necessarily required extreme haste, leaving little time for the exercise of caution, deliberation or reflection.

As to the character of the work and the occasion for mounting the push table at the time plaintiff was injured,

we quote from the testimony of the witness for defendant, Coffin (Tr., pp. 221-22):

“We were pushed pretty heavily on the day that this accident occurred. It was pretty heavy work, anyway. When we had an 8 by 8, we would double, the four of us, on it, or more if we needed them. Ordinarily we four men were expected to take the whole output of the mill, and handle it. It was part of our work to keep the lumber moving on the push-table there, and on this narrower table. It was a very strenuous work, about as hard a work as I ever did. I think it was the hardest I ever did. If the mill did happen to stop on account of filing the saw, or something of that sort, we worked ten hours. We commenced in the morning at seven o'clock and worked until twelve. And then commenced at one and worked until six. And this is the work we were doing at that time. I do not recall of the mill being stopped at any time to allow the putting in of a skid or fixing it. The lumber used in the skids, as you have them represented there, I think was 4 by 8, or 12, I am not sure—by 8, I think. I think 4 by 8, at that time it was either 3 by 8 or 4 by 8, I am not certain which. I know I made one of them and put it in myself. All sorts of lumber came down over those skids. Just before I saw McCann jump up on to the carrying table, the day of the accident, I was standing about the middle of the—partially facing it, and this carrier here. Both of them, both of these tables, pretty nearly, so we could see both. There was a pretty heavy jam at the time. Part of it lay on this lower table, and part of it on the skids, these two skids; I don't think there were two together, but the stick got in back here, a 2 by 4, I think it was, like that; this was already jammed with a little board, the way I remember it, down here, like that; when a board got on there these rollers would not have any effect on it to carry it, so this 2 by 4 got in like that, or a 2 by 6, I do not remember which it was, and it stood up endways, and

this lumber had jammed here, and this came in up here and made a double jam on it.”

See also testimony of McCann(Tr., pp. 122-123).

We submit that the evidence justified the submission to the jury of the issue upon the allegation that defendant gave plaintiff no warning or instruction as to how to mount this push table, or as to any danger involved in so doing, although the general manager and the foreman knew that plaintiff upon occasion adopted that method of mounting.

McCann (Tr., pp. 114-115, 120, 122-123, 125).

From Kilty's testimony (Tr., p. 201), we quote the following:

“When I employed *this boy* I did not take him and point out the possible dangers of this machinery: I showed him his place and started him, instructed him what to do, the same as all the rest of the men. I never said anything about the jams at all to any of those men about that push-table. They knew their job was to release those jams, if there was any. Every man around the place knows their job. The *boy* knew that, too. I did not instruct him at all as to how he ought to go up on the push-table; I just told him where his place was to work, that is what I told him. I didn't tell him that I expected him to work at releasing these jams when it occurred; I didn't happen to tell him that duty; I didn't tell that to any man there. They knew it was part of their job; they were there to take all the lumber that came from the mill; they were to take it off of the platform, and it was their work to see it came on the platform. They knew that; I didn't have to tell them that particular thing that way. They knew if it was necessary to do so in their judgment they must get up on to the push-table; they knew their job and they knew they had to take all the lumber that came from the mill. I didn't tell them how to get up on the push-table; I didn't speak about the push-table at all; I never had to give

them that particular instruction; I gave them no instructions about the push-table. I would think I was insulting a man to tell him to watch out for this revolving shaft if they got up over it; you didn't have to tell them that."

We further submit that the evidence justified the submission to the jury of the issue upon the allegations that the defendant, though requiring the mounting of the push-table, provided no proper or safe way or appliance to be used in mounting it. The testimony of Kilty above quoted contains the statement:

"I did not instruct him at all as to how he ought to go up on the push-table."

And here we take occasion to point out an error into which the brief for defendant falls in the statement (page 13):

"that one day he (Kilty), saw the defendant in error up on the *push-table* and that he called him down immediately."

On this subject the testimony of Kilty simmered down on cross-examination to the following (Tr., p. 196):

"I saw the young man on the *carrying table* at one time and asked him to get down so he could clear the table—keep the table clear. He was doing nothing there. I wanted him to get down and hustle up the work, get the tables clear. That was all that was necessary, to keep that lumber off the table; and that is all I said, to get down and get the lumber off the table on the cars and hustle the work."

The succeeding part of the statement on page 13 of the brief, to-wit: "that he often told him to come down and stay on the loading table" seems to imply that Kilty was speaking of coming down from the *push-table*; we submit that Kilty's reference was altogether to the *carrying table* (Tr., pp. 183, 184, 190). Already this statement

shrunk on cross-examination to a single occasion, as shown by the above quotation from the transcript, p. 196.

The following statement on page 13 of the brief, to-wit: "*that men who were loading lumber were not expected or required to go upon the push-table,*" we must protest, is directly contrary to all the testimony in the case; as we read the testimony of every witness for plaintiff and defendant, to-wit: McCann (Tr., pp. 103, 105, 114, 119-120, 122, 123, 131, 143, 170); A. W. Diller (Tr., p. 175): "These men saw to releasing any jams of lumber as it came from the trimmer." Kilty (Tr., pp. 185, 186, 189, 190-191, 192-193, 196, 197, 201, 202); Coffin (Tr., p. 221): "It was part of our work to keep the lumber moving on the push-table there and on this narrower table;" All unite in testifying that this extra-hazardous work was imposed upon these four men.

Moreover the jury was quite justified in believing the testimony of McCann (Tr., p. 168), that:

"The reason I did most of this work was that I had orders to get up there, and then I was, as you might say, ambitious to do the work, so I would be in favor and be promoted."

For Kilty said (Tr., p. 202):

"The *boy* seemed to be ambitious to do his work and I considered him a good willing worker."

With respect to the statement, on page 14 of the brief, "that plaintiff denied that he had been warned by Kilty to keep off the push-table," we are unable to find in the record either any evidence that Kilty warned plaintiff to keep off the push-table or that there was any denial or occasion to make the denial as suggested, since there is no evidence that Kilty gave any real warning, or at any time found any fault with plaintiff for mounting the push-table.

What the evidence of Kilty does show, however, is that while plaintiff was required to mount the push-table

whenever there was occasion to do so to release a jam, he declared that he "did not instruct him at all how to go up on the push-table." (Tr., p. 201).

He says, however, (Tr., p. 204) :

"I guess there seemed to have been a choice here how to get up, whether to get up on to this push-table over the cart or some other way; that is, one way you could do it."

This is as much as to say that this foreman and Even-son, the manager of the mill, left it to the judgment of the plaintiff in any given fortuity of condition of things about the push-table when a jam occurred, whether he should mount by a lumber cart over the revolving shaft, or from the carrying table over the revolving dog roller. That there were means *provided* to mount the tables is not even claimed. They were the only possible alternatives presented to plaintiff by a plant as bare of any appliances to mount this push-table as though the machine had been properly installed and in perfect operation doing its full function automatically with never an occasion to mount the push-table at all to release jams. And yet plaintiff was given no warning or instruction, but left to his own unguided judgment whether under a given state of things he should pursue one or the other of these two alternatives.

It is as convenient here, as elsewhere, to comment upon what is clear from the evidence as to the risk of mounting upon this push-table from one of these two-wheeled lumber push carts.

These carts had platforms extending over the wheels, and this platform, as shown by the testimony, was between two feet and two feet and six inches in height above the floor of the loading platform. (Tr., p. 145.)

The surface of the push-table was 5 feet 7 inches above the level of the loading platforms. To mount from an empty cart standing by the push-table upon the push-table

involved a climb of more than 3 feet over the revolving shaft (Tr., p. 168). The only way this could have been done would have been to reach over the shaft, grasp the 4-inch guard rail extending along the east side of the push-table, and draw the body up over the revolving shaft, pressing upon it in the ascent, and the failure to adopt it is not chargeable to plaintiff either as assumption of risk or as contributory negligence. Clearly this was an impossible alternative. And not only would there have been imminent danger in so climbing up of the clothing being caught by the revolving shaft, but there would have been even more imminent danger, not only of the hands, while grasping the guard rail, but of the skull itself being crushed by lumber coming down "viciously" against that guard rail as the undisputed testimony shows it often did. Kilty, with all his bias, admitted that he would not be so foolish as to lean against the roller when revolving. (Tr., p. 194. Kilty said (Tr., p. 201) :

"I gave them no instructions about the push-table. I would think I was insulting a man to tell him to watch out for this revolving shaft if they got up over it; you didn't have to tell them that."

What he says (Tr., p. 195), is:

"If a man was standing on the load of lumber on one of the carts, he could reach in and reach any part of the platform, *if the cart was just right.*"

But at what stage of the loading was the cart "*just right?*" A full load of lumber on one of these carts ran from one to two thousand feet. (Tr., p. 208.) The height of the load from the top of the car was from 3 feet (Kilty, Tr., p. 208), to 4 feet (McCann, Tr., p. 145). This would bring the top of a full load from 5½ to 6½ feet from the level of the loading platform. Manifestly, such a load as an appliance or means over and from which to mount upon the push-table was both dangerous and impracticable.

Loosely piled there was danger of its being drawn over and upon the person trying to climb up upon it. (Tr., pp. 124, 145-6, 156). The mounting of it would have been an undertaking in itself equivalent to the mounting of the push-table itself.

McCann agrees with Kilty that "at times when there was a truck there with lumber piled 'just right' (Tr., p. 113), one could get up from 'F' on to the push-table and not go over the dog roller."

But when was the condition of the cart "just right" in the identical phrase used by both Kilty and McCann? McCann says (Tr., p. 113) "*If the lumber was too high or too low it wouldn't be any good.*" And, plainly, the pile of lumber on the truck to make it available as a means for mounting the push table with any safety over the revolving shaft was at such a height as to be low enough to be readily mounted from the platform "F," and high enough to permit of stepping from it over the revolving shaft upon the push-table. In other words, to be "just right" the height of the lumber on the truck had to be somewhere intermediate between the height of an empty cart and a fully loaded one. Upon this point there is no conflict in the testimony.

Now, there is no testimony in the record tending to show that when this injury occurred that the cart which happened to be standing by the push table was loaded "just right." The testimony is all the other way. McCann in his deposition (Tr., p. 124), taken by the defendant November 29, 1909, testified on examination by counsel for defendant:

"The reason why I didn't try to get upon the truck it was either too high or too low. I recollect it being one of the two; if I remember exactly right, it was piled exceptionally high with pieces that would have

fallen off if I tried to get up on the side and climb up the side."

He also states the alternative thus:

"The most convenient way was to get up on the table, B". (Tr., p. 124).

Nor was this testimony varied by McCann's subsequent cross-examination at the trial by counsel for defendant. (Tr., p. 156).

Now, since there were only two ways for mounting this push-table from the loading platform "F", and since, and all the proof tends to show, without conflict, that mounting from the cart was not feasible, there plainly was no other way left to mount except to step from carrying table "B" over the dog roller upon the push-table. Plaintiff was required to go there and had but one way to go.

We submit that it was flagrant negligence on the part of defendant to confine plaintiff to the choice of either alternative method of mounting the push-table, and that the court properly submitted the question of defendant's negligence to the jury. And that in the condition of the evidence to have given the instruction No. XI requested by defendant (Tr., 259), would have declared as a fact that climbing up by means of the lumber buggies was safe, and would have been highly erroneous.

We shall have occasion to refer to the fact that there is no evidence tending to show that the push cart was "just right" to serve as a means of mounting the push-table, when we come to discuss the error assigned for the refusal to give the instruction XI requested for defendant.

We do not concur in the statement made in the brief on page 11, to-wit:

"There is no suggestion in the record that at the time of his employment any officer or agent of plaintiff in error knew or had any reason to suppose that he was a minor."

In the first place, it is the proved fact that he was only 17 years and two months old at the time he was first employed. Kilty says (Tr., p. 181), that he was “an *ordinary* young man.”

In their evidence the witnesses for defendant unconsciously fall into referring to him as the “boy” though Kilty makes a studied effort to refer to him as the “young man” and not a boy.

This (Tr., p. 202), sub-conscious recognition of his youth comes out thus:

“*The boy* seemed to be ambitious to do his work, and I considered him a good willing worker.”

At transcript, p. 201, Kilty says:

“When I employed *this boy*, I did not take him and point out the possible dangers of this machinery.”

Coffin states on his direct examination (Tr., p. 211):

“I have saw the gentleman, *the boy*. I have worked with him at the Benson Lumber Company.”

At transcript, p. 214, on his direct examination, he stated:

“I hollered both before and after the *boy* caught his foot.”

At transcript, p. 224, Coffin says:

“When I took *the boy's* foot out of there, etc.”, and again: “When I lifted *the boy* up, I went right in between and took *the boy's* foot, etc.” “I lifted *the boy* up.” And p. 225: “I stood down here and pulled the *boy* out this way.”

This same witness afterwards on re-examination undertakes to overcome his involuntary admissions that he regarded plaintiff, not as a boy, but as much of a man, as he was 6 years and more later. His testimony was for the jury to reconcile, if possible; and if not possible, to determine whether his sub-conscious reference to the boyhood

of plaintiff was the truth, or whether his later attempt to deny what he unconsciously affirmed was the truth as he knew it.

Again, Dr. Hearne, the surgeon, when the plaintiff was brought to his hospital, on his cross-examination by defendant, stated evidently from the mere appearance of the boy, that he was under age, and that he required a permit from his father and mother before he performed the amputation. (Tr., p. 102).

It has been held that the reference to the injured person by witnesses in their testimony speaking of him as the "boy" in connection with his physical appearance at the time (as inferable here from the testimony of the surgeon), was evidence from which his minority might be found by the jury. *Texarkana & Ft. S. Ry. Co. vs. Preacher*, (Tex. Civ. App.), 59 S. W., 593, 594. In that case the injured plaintiff was also 17 years old.

Kilty said he was an "ordinary young man". Dr. Hearne stated:

"I would say that ordinarily the *boy* is more developed now, and more of a man than he was at that time."

The evidence shows that at the time of the injury he weighed 140 pounds; and 6 years later weighed 170 pounds.

We submit that there was abundant evidence tending to show that his youth was apparent to the defendant at and during the time of his employment, and that the issue upon the knowledge of defendant of that fact was properly submitted to the jury.

We submit that the court did not err in so doing under instruction VIII (Tr., p. 238-9), which defendant's brief (p. 81), admits was correct, but only claims was inapplicable.

On page 39 of the brief for defendant, is a quotation from the record (Tr., p. 117), emphasized by italics as though of particular importance. But, when examined, it is apparent that it stated the mere truism that the mill could be stopped from somewhere inside, where the single engine was which furnished the power for all portions of the mill. But there is not a particle of evidence that plaintiff or his associate lumber loaders outside of the mill had any means of communication with the engineer; nor is there any evidence that the rollers in this push-table were ever stopped for any jam whatever.

There is further, as we submit, an exceedingly important and overshadowing element in the evidence with respect to the unsafe character of the push-table as a place which plaintiff was required to mount or over the dog-roller, one of the only two ways possible, the other one of which was only occasionally and by accident possible, and which the evidence shows was not feasible at the time. That element is the "X board" in front of the dog-roller. We shall fully discuss this in answering the argument that plaintiff assumed the risk of the injury he received.

We submit that the findings implied in the verdict (Calif. Code of Civil Procedure, Sec. 1963, Sub-div. 18), that that defendant was guilty of every charge of negligence made in the complaint are supported by the evidence; and that such evidence required the submission of the issues as to defendant's negligence to the jury and that the court did not err in refusing to direct a verdict for the defendant on those issues.

The respects in which the defendant was thus found negligent may be summarized thus:

1. In that defendant maintained defective installment of its machinery for delivering lumber to the loaders, of whom plaintiff was one, causing exposure of plaintiff to

extra-hazardous risks of mounting the push-table while the mill was in operation to release jams, outside of and in addition to the work to do which plaintiff was employed.

2. In that it maintained this push-table in an unnecessarily dangerous condition.

3. In that it provided no proper appliance for mounting the same, necessitating the mounting of it over the dog-roller.

4. In that it ordered and required plaintiff, knowing his youth and inexperience, to mount the push table as best he could, without giving him warning or instruction as to the dangers involved in so doing.

5. To this is to be added, that the sum total of all these defaults on part of defendant, taken together with the excessive strain and stress and hurry, amid the noise and confusion caused by the conditions under which plaintiff was required to perform this extra-hazardous work in addition to the full demands upon his strength by his ordinary work, constitute a case of either thoughtless, or else callous and reckless, repeated exposure and subjection of this youth to peril, the like of which does not often occur in the reported cases.

Such cases as we cite will be under later headings in this brief.

PLAINTIFF DID NOT, AS A MATTER OF LAW, ASSUME THE RISK OF HIS INJURY, BUT THE QUESTION OF ASSUMED RISK WAS FOR THE JURY.

Counsel for the defendant very properly pointed out that the doctrine of assumption of the risks incident to an employment rests upon the basis of implied contract of the servant to assume them; and that the defense of assumption of risk, is entirely distinct from the defense of contributory negligence.

Choctaw O. & G. R. Co. vs. McDade, 191 U. S., 64, 68.

With this distinction in mind, we enter upon the inquiry as to the validity of the contention of defendant that plaintiff assumed the risk of the injury sustained by him, as a matter of law, and that the District Court erred in submitting the issue upon the evidence to the jury. We desire to consider the question entirely apart from the distinct defense on the alleged ground of contributory negligence.

The argument for defendant, that plaintiff by his contract of employment, assumed the risk which *when* encountered, and *as* encountered, led to his injury, necessarily implies and proceeds upon the premises, that plaintiff's attempt to mount the push table from the carrying table over this dog roller, was in the line of his employment; that the risk in doing so was incident to the particular act pursuant to the duty in which he was engaged at the time when he received his injury.

This particular contention necessarily concedes, not only that the servant was required by the general terms of his employment, but under the testimony pursuant to what amounted to an express standing direction of the foreman Kilty (Tr., pp. 120, 122, 123) approved and acquiesced in both by the foreman and the general manager (Tr., p. 122) to mount this push table in the precise manner in which he sought to mount it when he was injured, whenever it appeared necessary to do so to release and disengage jams of lumber upon the push table.

It follows, by logical necessity, that the whole argument points that the plaintiff *assumed* in law this specific risk which taken, resulted in his injury, and that it was the exact risk which the employer and employee impliedly agreed with each other should be taken by the employee.

Now all the cases cited by defendant upon this doctrine of assumption of risk of which *Bresette vs. E. B. & A. L. S. Co.*, 162 Cal., 74, and *St. Louis Cordage Co. vs. Miller*, 126 Fed., 495, 511, *et seq.*, and the cases therein cited, are typical, are cases in which the injuries were received by the employees from the *normal functioning of the machinery* about which the servants were employed. Thus in the Bresette case, an oiler in reaching across moving and unguarded gears had the sleeve of his arm caught in the revolving jams and lost his arm thereby. In the case in the 126 Fed., 495, 511, *et seq.*, *supra*, the plaintiff had her hand crushed in unguarded cog wheels. So with the numerous cases of hands or other members of the body being caught in exposed cog machinery or gearing, or in rollers or pulleys or hashers, or shears, or by set screws in revolving shafts or in die machines, or saws or cutters and the like. All of this class of cases are cases of risks contractually assumed by the injured employee where *there was no negligence on part of the employer*. Hence for the moment, laying aside considerations arising 1st, from the age of the plaintiff; 2nd, from the failure of defendant to give him any warning or instruction; 3rd, from the extra hazardous nature of the requirement, beyond the terms of the original employment, to mount this push table to assist the defective operation of the machinery, and 4th, the considerations respecting the failure of the plaintiff to provide any suitable appliance for mounting this push table, we propose to pursue the specific inquiry here, upon the extremest construction of the testimony in favor of the defendant, bearing upon the extent of the contractual assumption of risk as contended.

We have then the case of employment of plaintiff to mount the "push table" by stepping up onto it from the carrying table whenever a jam of lumber occurred on the push table, which required loosening. What obvious risks

did the plaintiff contract to assume in that employment upon the extremest view of the evidence in favor of the master, divested for the moment of all the qualifying considerations we have mentioned? Such risks are embraced in the following category and we can conceive of no others.

1st. The risk of being struck by timber and lumber, which in all sizes from timbers 8x8 inches to inch boards, was in the operation of the mill being continually precipitated down the skids from the inside of the mill as the witness Coffin described (Tr., p. 216) "very viciously", a statement which is borne out by the grinding and gouging out of the 4-inch guard rail on the east and farther side from the mill of the push table (Tr., pp. 106, 165). Such risk of being struck might be either when the lumber was falling from the skids on the push table, or being carried southward by the rollers in that table.

2nd. The risk of stepping upon any of the rollers revolving in the push table, including the dog-roller and the loss of footing thereby, and so being thrown down on the table.

These, it will be observed, were risks attendant upon the operation of the machinery in delivering and conveying lumber which inevitably confronted any effort to mount the push table by stepping on it from the carrying table.

The discharge of the lumber down the skids and the revolving of the rollers, and the carrying of the lumber by them southward for delivery upon the carrying table, no matter how defectively the machinery was discharging these functions, were all on the line of the offices in the processes of manufacturing lumber which they were designed to perform. It was to aid and supplement their defective operation that the plaintiff was so required to mount the push table.

THE X BOARD.

But neither of these things was the proximate or efficient cause of the plaintiff's injury. There existed an altogether distinct element, which had no place in the economy or functions of this mill and machinery. And that is what is referred to in the testimony as the "X board". This was a board or plank nailed in the frame of the push table, parallel to the dog roller for its whole length, and within about a quarter of an inch of the longest spikes or projections of the dog roller, and within about one inch from the top of the roller, according to McCann (Tr., pp. 137-138), and within three inches of the top of the dog roller according to the witness Diller. The length of the spikes on the dog roller were $\frac{3}{8}$ to $\frac{3}{4}$ of an inch (Tr., p. 176). There is nothing to show that they were sharp. Kilty testified that "*The plank X had no connection with the moving of the lumber. It had no utility whatever in handling the lumber.*" (Tr., p. 200.) While he differs with other witnesses as to the time and means of its removal he states that after it was removed "*It was not put back because we had no use for it.*" (Tr., p. 200.) "There were not any boards placed back on it after that; that is not while I was there. I stayed more than a year after this accident happened." (Tr., p. 189.)

The witness Diller, who made the model in evidence, testified (Tr., p. 175):

"If I remember correctly, I made this model about two years ago. When I made the model this plank was not parallel to the dog roller of the mill; I put this in the model because it was there at the time the accident occurred. I tore out the plank or else the man working with me tore it out, I do not remember. Mr. Evenson (the general manager) ordered us to take it out. I think it was the Monday morning perhaps after the accident."

Coffin, witness for defendant, states (Tr., p. 225):

“Shortly after the accident this plank in front of the roller was knocked out by myself; it was in my mind that way. It was done at nobody’s orders. I don’t know how long after the accident, but I had no instructions to do it; I knocked it out because *I considered it dangerous.*”

We here refer to this testimony so far as relates to the removal of this X board, all of which was received without objection and by common consent, only to emphasize the fact that it served no function in the work of the mill, that it was entirely extraneous to any such work,—a wholly superfluous thing.

But it was worse than useless and superfluous; it added a new, malign and latent function to the environment of the work required of plaintiff without which it would have been impossible for this injury to have occurred. *It was in view of the service required gross negligence on the part of defendant to maintain it.*

For the injury to him was accomplished not by the free action of the dog roller, but by the X board holding his foot between it and the dog roller, in consequence of which the roller ground and crushed his foot.

(McCann, Tr., p. 114; Kilty, Tr., p. 188; Coffin, Tr., p. 224.)

Indeed counsel for defendant correctly say that the injury was caused by “his accidentally getting his foot caught between the dog roller and the X₄ board.”

If the X board had not been where it was and at the distance it was from the dog roller, the injury in this case could not have occurred; because no possibility of grinding or crushing by the dog roller would have existed.

If the space in the direction in which the roller was revolving had been wholly free and open it would have been impossible for this injury to have been caused.

The X board was in fact placed at such a distance from the roller that the two co-operated to make a most efficient crushing machine; the X board operated as a plate adapted to hold and confine any member of the body which should be thrown against it by the roller, until it was entrapped, drawn in between the two by the roller and subjected to the crushing and grinding process. (Tr., pp. 169, 224.)

This co-ordination of the X board with the rollers created a latent, extraordinary and *extraneous* danger of which co-ordination there can be no pretense that plaintiff knew any thing; and much less any pretense that he either understood, comprehended or appreciated the danger lurking in that combination.

It was said in the opinion of the Supreme Court of California, in bank, in *Bone vs. Ophir Silver Mining Co.*, 149 Cal., 293, 294, that:

“The rule is unquestioned that the duty of informing a servant of latent or extraordinary dangers or risks connected with the service of which the master has knowledge, is not only a duty, but is a primary duty. * * *”

True the court further said:

“It is to be noted, however, that this rule applies to latent and *extraneous* dangers of which the master himself has knowledge, or, of which, with the exercise of ordinary care, he should have knowledge.”

Now the Benson Lumber Company put this X board where it proved its dangerous character; it was an unnecessary and improper thing; it was entirely extraneous to the work of the mill; it created the combination which was the primary, proximate and efficient cause of this injury, with which all other risks of the employment (discussing from the standpoint most favorable to defendant) merely worked in co-operation, but which in and of themselves they could not have accomplished.

Who is responsible for this X board which by reason of the fact of its combination and co-ordination with the dog-roller constituted a veritable man-trap? Is it the defendant who built it or the plaintiff who had not the slightest conception of the danger which lurked in the combination?

It is thus, we submit, clear that this extrinsic element of risk to which the plaintiff was exposed distinguishes this case from all those relied upon by defendant under the defense of contractual assumption of the risk. In those cases there was no negligence imputed to the master. But here the negligent act of the master was the *causa causans of the injury*.

Those cases are, we submit, all of the class of risks arising from the functioning of the machinery in its purposed work. The doctrine of contractual assumption of risks even by an adult servant is confined to the acceptance by him of the *ordinary risks incident* to his employment. The reason for the distinction is plain and palpable. For an illustration we take the very case of *Bresette vs. E. B. & A. L. Stone Company*, 162 Cal., 74, 78, which counsel for defendant claim to be unable to distinguish from the case at bar. In that case, let it be observed, that the plaintiff was employed to oil the very machinery, in reaching across the moving and unguarded gearing of which the sleeve of his left arm was caught in the revolving gears and his arm injured. Thus he was employed to work with the identical combination of intermeshing cogs in which his arm was caught. His employment to thus attend that machinery necessarily directed his attention to the operation of the normal functioning of the gears in their designed and ordinary working. He could not even begin his work of oiling without of necessity observing such working. The constantly repeated demonstration of its operation was before his eyes at all times when the machinery was doing its intended work. He was there employed to pro-

mote this functioning. And the court properly held that he assumed the risk of danger from the operation of the unguarded gearing.

Let it further be particularly noted that in that case every part of the interoperating gearing was a necessary part of the machine as a whole; it was there to perform its designed and intended office; nothing was superfluous, useless or unnecessary, or the causation of extensive or latent danger, but only of patent risk absolutely incident to and inseparable from the operation of the machine.

Again, let it be observed, that the defendant in that case was by the opinion of the court absolved from any negligence. The plaintiff, an adult, had been employed to work about the unguarded gearing. His contract of employment implied the assumption of the risk in the ordinary operation of the machinery in the condition in which it was. There was therefore no room for the charge of negligence, in that case against the master. For as we shall take the occasion later to point out, a servant is never held to the implication that he *assumes* the risks caused by the master's negligence; hence if under the facts of a given case there is contractual assumption of the risk, the encountering of which led to the injury, there can be no imputation to the master of negligence as responsible for that injury.

Turning now to the case in hand. Under the evidence here there can be not the remotest pretense that the finding implied in the verdict that the X board was the efficient, the proximate and the *sine qua non* cause of this injury, is not only amply supported by the evidence, but that a finding to the contrary would have been against the undisputed evidence.

It must also be taken that the implied finding by the verdict that it was a useless and extraneous intruder upon the push table, which superadded a mischievous and dan-

gerous combination by its relation to the dog roller, and that this dangerous capability was inherent in the combination, but existed lurking for its prey, latent and unobserved, by the employee, is not only justified but made imperative by the evidence. Its malign function was nothing which the employee was hired to further or promote; his employment was not to see objects ground between the X plank and the dog roller. He never had seen it do that sort of thing.

But the employer put it there; and in the words of the Supreme Court of the United States in *Hough vs. Texas & P. R. R. Co.*, 100 U. S., 213, 217, the

“Master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for the use of the latter.”

Did the master in this case discharge this duty, by superadding to the push table this X board which constituted the efficient cause of the injury, but contributed nothing to functions of the push table or to further the work for which plaintiff was hired?

Recalling again the hypothesis upon which the argument for the defendant that plaintiff assumed the precise risk of the injury he has sustained, proceeds, to-wit: that plaintiff was hired among his other duties, to mount the push table in the way he sought to mount it, we ask where can any authority be found for the proposition, that the servant contracted to assume the risk of this mantrap in addition to the risks incident to the operation of the machinery in the line of its proper functions of delivering lumber? Such a proposition would be equivalent to the claim that the servant impliedly contracted to exonerate the master from the consequences of his tortious negligence.

Or where can a respectable authority be found which declares that under such circumstances it is so clear that the servant assumed this extraneous risk that the jury should have been directed to find for the defendant, or that the appellate court should reverse the judgment for plaintiff on the ground that as a matter of law he *assumed* that extraneous risk?

We agree with counsel (brief, p. 54) so far forth that "whether plaintiff's foot *was caught*, by his making a misstep or being struck by lumber is immaterial."

For we submit that whether his foot was brought into contact with the roller by a misstep or by being borne down on it by descending lumber, it was not that contact that was the proximate cause of the injury. True it may be that he lost his footing by his foot being carried out from under him by the roller since he was thrown down, face forward, his full length upon the push table. (Coffin, Tr., p. 224.) But this fall caused him no serious injury. (Tr., p. 111.) It was not the fact, if fact it was, that lumber struck his foot that caused the injury, for the impact of the lumber upon his foot did him no harm. He says (Tr., p. 111): "I did not receive any other serious injuries outside of my foot; it was just my foot that *got caught*." *It was the being caught which did the mischief*. This, however, could not possibly have occurred but for the placing by defendant of the X board where it was; this and this alone was the true proximate cause.

The argument for defendant as to assumption of the risk is that the misstep by which the foot struck the roller, or the striking of lumber upon the foot bearing it down into contact with the roller were in the nature of inevitable accident, or an inanimate thing contributing to bring the foot in contact with the roller. But it was not the roller by itself which did or could hold the foot subject to

its operation. It was the superadded and foreign element of the X board which held the foot to be crushed and mangled. This was the efficient and proximate cause and made the latent combination and the lurking danger which inflicted the injury.

We here note that the court gave in its instruction No. XI (Tr., p. 242) the identical instruction as to proximate cause No. VIII requested by defendant. Therefore all the assignments of error based upon the supposition that this instruction was not given (see Tr., pp. 256-257; Brief, p. 23) and the argument made upon that supposition, (Brief, pp. 85-88) are the result of the misconception.

Under this instruction and the evidence proving beyond doubt that but for this X board the injury could not have occurred, the jury were justified in finding that the negligence of the defendant in maintaining this unnecessary, and in view of the service required of plaintiff, dangerous extraneous combination, was the proximate cause. And we submit that the evidence was properly submitted to the jury.

The misstep or the bearing down of lumber, whichever the case may be, which brought the foot upon the roller, were antecedent occurrences, to the grinding of the foot against the X board.

Defendant virtually says in making this defense of assumption of the risk from which the injury was sustained:

“Plaintiff agreed to take the chances of the misstep, or of the descending lumber, bringing his foot in contact with the roller, because the revolving roller and the descending lumber were inseparable incidents of the business about which plaintiff was employed; his employment called for his mounting on the push table over the roller and in face of descending lumber, upon this particular occasion. Therefore the injury was the result of pure accident, the risk of

which was assumed and the court should have directed a verdict for defendant."

But as was said in the case of *The Joseph B. Thomas*, 81 Fed., 578, 584:

"It is well settled that it is no defense in an action for a negligent injury that the negligence of a third person, or an inevitable accident, or an inanimate thing contributed to cause the injury of plaintiff, if the negligence of the plaintiff was the efficient cause of the injury."

In *Pullman Palace Car Co. vs. Laack*, 143 Ill., 245, 32 N. E., 285, 291, there is quoted with approval from Bishop on Non-Contract Law, the following:

"A person contributing to a tort, where his fellow contributors are men, natural or other forces or things, is responsible for the whole, the same as though he had done all without help."

The court further said in that case, p. 291:

"It is well settled that where the injury is the result of the negligence of the defendant and that of a third person, or of defendant and an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover if the negligence of the defendant was an efficient cause of the injury."

As put in *Scandell vs. Columbia Construction Co.*, 64 N. Y. Supp., 232:

"Where the evidence was sufficient to support a finding that the negligence alleged was the proximate cause of an injury to a servant, *without which the injury* could not have occurred, it was error not to submit the case to the jury, though another defect was also a proximate cause of such injury." (Italics ours.)

Here, however, as already remarked, neither the misstep nor the descending lumber can be regarded as contributing proximately to the injury, but were strictly an-

tedent links in the sequence of occurrences; the final and efficient cause was the X board.

The injury as we have abundantly insisted would have been impossible but for the X board; and that had no business there; but the fact remains that the master put it there. The combination which it effected with the dog roller was the negligent act of defendant; and since this combination had no utility or proper function in the mill, the risk from it we submit was not assumed.

When the case of *Sanborn vs. Madero Flume etc., Co.*, 70 Cal., 261, which is sought to be distinguished from the case at bar, is compared with it, we submit that this is a far clearer case of *non assumption* of risk than that. There the plaintiff was injured by the fact that a defective substitute for a sword the purpose of which was to enter the cut made in a log by the saw, failed to do its designed work. There "notwithstanding the sword was obviously insufficient and known by the plaintiff to be unsafe," the court held that whether the plaintiff assumed the risk and was negligent was a question for the jury.

There it will be seen that what caused the injury was what occurred in the very work for which the plaintiff was employed and in operation of one of the functions and appliances of that work; this function was defectively discharged, because of the defective substitute for the sword, and the injury resulted.

In short there was present the element of negligence on part of the employer.

The court held that the risk was not assumed, although the servant knew the defective instrumentality; saying, in substance that was not enough unless he also understood the risk to which it exposed him.

But if it be the law, as held in that case, that where a servant, working about defective machinery, knows the

defects in the instruments provided for its proper work, but does not understand the risk from them, he is not to be held to assume that risk as a matter of law, then *a fortiori* it must be true, that there can be no assumption of a risk created by the master wholly extraneous and collateral to any function of the machinery to work about which the servant is employed, but yet so connected with such machinery that the servant is exposed to it while in the line of his duty.

There is absolutely no evidence here that before this casualty McCann or any of his co-employees understand or appreciated the danger in this X board; it was not until after the occurrence showed its dangerous character that his co-employee knocked it out because it was dangerous (Tr., p. 225) under the order of Evenson the Superintendent (Tr., p. 175).

Indeed since it had no function in the mill, the law will not imply an assumption of the risks which it created; for an employee only assumes such risks as are *incident* to the employment. The italicised portions of extracts from opinions quoted are ours unless otherwise indicated.

In *Baxter vs. Roberts*, 44 Cal., 187, 192, it was said:

“That one contracting to perform labor or render service thereby takes upon himself such risks and only such risks as are necessarily and usually incident to the employment is well settled. * * *

“Nor is there any doubt that if the employer had knowledge or information showing that the particular employment is from *extraneous* causes known to him to be hazardous or dangerous to a degree beyond that which it fairly imports, or is understood by the employee to be, he is bound to inform the latter.”

A recent case in point upon the negligence of defendant because of the maintenance of this unnecessary X board, is the case of *Schellin vs. North Alaska Salmon Co.*, Jan-

uary 16, 1914, in the Supreme Court of California, 47 Cal. Dec., p. 138, 140-141.

In that case the plaintiff was injured by a set screw on a shafting. The following is from the opinion of the court:

"The collar and set screw performed no functions. Their presence at that place made it one of great danger to plaintiff, and it was defendant's duty to make and maintain there as safe a place as reasonably was possible;"

citing *Kreigh vs. Westinghouse C. K. Co.*, 214 U. S., 256; *Jacobson vs. Oakland Meat, etc., Co.*, 161 Cal., 432, and cases in them cited.

In the case in 214 U. S., 249, 259, *supra*, it was pithily said, citing the McDade case, 191 U. S., 64, 66,

"There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer."

It was also said in the case last cited (p. 256) quoting from *Santa Fe & P. R. Co. vs. Holmes*, 202 U. S., 438, respecting the duty of the master to provide a reasonably safe place for the carrying on of the work, the following:

"The duty is a continuing one and must be exercised whenever the circumstances demand it."

The cited case of *Chocktaw O. & G. Co. vs. McDade*, 191 U. S., 64, 66, is also in point as to this X board. It was said of the spout which caused the injury:

"As it was maintained, it was a constant menace to the lives and limbs of employees whose duties required them by night and day, to pass the structure. It is a case where the dangerous structure is not justified by the necessity of the situation, and we agree with the judgment in the court below that its maintenance under the circumstances was negligence upon the part of the railroad company."

In *Skelton vs. Pacific Lumber Co.*, 140 Cal., 507, 510, it was said:

“A servant, of course, takes upon himself all the ordinary risks and perils of accident *in the common course of the service in which he is engaged.*”

“The servant assumes the risk of every danger belonging to the work itself; *but if the master’s negligence aggravates such danger*, and the servant is injured thereby, he may recover.”

North vs. Dowling, 93 Mo. App., 156.

Upon this point the case of *Naudau vs. White River Lumber Co.*, 76 Wis., 120, is a clear authority valuable for its correct discrimination between contractual assumption of risk, and what is sometimes termed in the opinions assumption of risk when what is meant is contributory negligence, extending where there is fool-hardiness or recklessness on part of the employee to subjection to the maxim *volenti non fit injuria*.

We quote from the opinion, the whole of which is worthy of consideration as an aid to the proper disposition of this case the following passage, from page 131 of said opinion:

“The learned counsel for the defendant also contend that the presumption is that the plaintiff assumed all the dangers incident to his employment, and therefore the burden of proof was upon him to show that he did not know of the danger connected with this uncovered gear. We think in this the learned counsel are in error. The employee is only presumed to assume the dangers usually attendant upon his employment; and, when he shows that he has been injured by a cause or danger not usually or reasonably attendant upon his employment, he is then entitled to recover, unless it be shown that he knew of such unusual and unreasonable danger, and fully comprehended its nature, at the time of his employment or before the accident happened. The evidence in this case having established the fact that the injury to the plaintiff was caused by a danger which ought not to

have attended his employment, and would not have attended it if the defendant had performed its whole duty towards him, there is no presumption that the plaintiff assumed the unusual risk, and the burden of proof is on the defendant to show affirmatively that he did, to the same extent that it is on the defendant to show any other contributory negligence on the part of the plaintiff. The assumption of an unusual risk in any employment by the employee is in the nature of negligence on his part, which, like any other contributory negligence, prevents his recovery."

In *Hough vs. R. R. Co.*, 100 U. S., 213, 217, the court dealt with the doctrine of contractual assumption of risk implied in the contract of employment. The court said, page 217:

"It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages in for compensation."

The court further said:

"But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. * * * His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant in legal contemplation is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has ordinarily no connection with their purchase in the first instance, or their preservation or maintenance in suitable condition after they have been supplied by the master."

That the contractual assumption of risk excludes the idea of negligence on the part of the master which contributed to the injury, is shown by the following extract from the opinion in *Chicago M. & St. P. Ry. Co. vs Ross*, 112 U. S., 377, 383:

“But however this may be, it is indispensable to the employer’s exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence.”

So it is said in *Pantzar vs. Tilly Foster Iron Mining Co.*, 99 N. Y., 368, 376:

“The rule that the servant takes the risk of the service presupposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. It is these risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes.”

See also upon this subject, *McGovern vs. C. V. R. R. Co.*, 123 N. Y., 280, 287, where it is said:

“It may, we think, be laid down as a general rule, that the dangers connected with such a business, which are unavoidable after the exercise by the master of proper care and precaution in guarding against them, are risks incident to the employment and are assumed by those who consent to accept employment under such circumstances. But those dangers, which are known and can be mitigated or avoided by the exercise of reasonable care and precaution on the part of those carrying on the business, and injuries from which happen through neglect to exercise such care, are not incident to the business, and the master is generally liable for damages occurring therefrom.”

That the doctrine of contractual assumption of risks does not apply to such an extraneous risk as that occasioned by this X board, follows from the statement in the

opinion of the Supreme Court of Massachusetts, in *Murch vs. Thomas Wilson Sons & Co., Ltd.*, 168 Mass., 408, 47 N. E., 111, 112, as follows:

"The employee impliedly agrees to assume all the obvious risks of the business in which he contracts to work. Among these are the open, manifest dangers attendant upon the use of the ways, works and machinery of *permanent character that are plainly intended to be retained as part of the plant to which the contract for service relates.*"

Labatt on Master and Servant, 2nd Ed., Sec. 894, p. 2386, contains the following statement:

"894. (2) RISKS RESULTING FROM THE MASTER'S NEGLIGENCE ARE NOT ASSUMED BY THE SERVANT.—A proposition which has so frequently been enunciated by the courts as to have become axiomatic is that, *prima facie*, a servant does not assume any risks which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual, or extraordinary risks which the servant does not assume as being incidental to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties."

It was said in this Circuit, in *Bunker Hill & Sullivan Min. & C. Co. vs. Jones*, 130 Fed., 813, 818:

"While it is a ruling principle that a person entering voluntarily into a contract of hiring assumes all the risks and hazards ordinarily incident to the employment, and liable to arise from the defects which are patent and obvious to a person of his experience and understanding, it is equally true that risks arising out of the negligence of the master are not those ordinarily incident to the employment, and are not, therefore, assumed by the servant. *Texas, etc., R. R. Co. vs. Archibald*, 170 U. S., 665, 18 Sup. Ct., 777, 42 L. Ed., 1188."

To the same effect is *San Francisco & F. S. S. Co. vs. Carlson*, 161 Fed. 851, 854, in this circuit.

We submit that there was here no implied covenant on part of plaintiff in his contract of employment to hold defendant harmless for its negligence in maintaining this useless X board in a place where it co-operated with the dog-roller to create the man trap which first revealed its capacity to injure when it caught plaintiff's foot.

There was no contractual assumption of the risk from this latent and feline danger occasioned by the negligence of the master.

In *Hawley vs. Chicago, B. & Q. Ry. Co.*, Circuit Court of Appeals, 7th Circuit, 133 Fed., 150, the plaintiff's decedent was killed by being struck by the projection over the railroad track of defendant of a roof of a building maintained by the defendant. One of the defenses was assumption of risk. After quoting from *Hough vs. R. Co.*, 100 U. S., 213, *supra*, the court said:

"From the above quoted declaration of the Supreme Court in *Hough vs. Ry. Co.*, it is very clear that decedent on entering the service did not assume the danger from the roof corner that projected over the track as needlessly as a pipe or bayonet."

We submit that a similar statement would be proper with respect to this X board.

AS TO THE FURTHER AND CONCURRING ELEMENTS OF THE EMPLOYER'S NEGLIGENCE.

We have thus far argued the question of the propriety of the submission to the jury of the question of contractual assumption of risk, commenting only on the single feature of the master's negligence, consisting in his requiring the servant to mount the push-table from the dog-roller with which the X-board made the combination extraneous to any function of the mill, which combination was the efficient

and proximate cause of the injury complained of. Before further examining the defenses which proceed upon the concession of negligence upon the part of the defendant corporation, it seems proper to refer to the elements of the master's negligence which concurred with the negligent act of maintaining this X board.

They are, first, that under the finding implied in the verdict that defendant knew when it employed plaintiff that he was a boy 17 years of age and inexperienced; that his contract with defendant was to load lumber on push-carts after it had been delivered within his reach by the machinery of the mill, while working on the loading platform. That because of the defective functioning of the newly installed push-table and carrier-table, they frequently failed to work automatically as designed, for which reason it developed after the employment that jams and clogging of lumber occurred on these tables, that required to be released by mounting the table to disengage, by hand, the accumulations and jams of lumber.

That no suitable or proper appliances were furnished by defendant for mounting the push-table.

That defendant gave plaintiff a standing order to mount the push-table when it appeared necessary to release such jams and help out the functioning of the machinery and left him to mount the push-table in any way he could. That the surface of this push table was 5 feet 7 inches above the level of the loading platform, on which plaintiff contracted to do his work.

That appellant gave him no instructions how to mount or any warning of any danger in any method of so doing.

That it knew that the quickest and most ready means of mounting the push-table was to step upon the carrying-table from the loading platform by means of a step provided between it and the push-table, and from thence over the

dog-roller on the push-table, and that when early in the service plaintiff was ordered by the foreman to mount the push-table, this was the method pursued by plaintiff, as was then seen by the foreman who gave the order; that both the foreman and the superintendent of the mill frequently saw him mount in this way, but at no time gave him any advice, instruction or warning against so doing.

All these facts considered in connection with the maintenance of the X-board, did the court err in refusing to hold as a matter of law that the plaintiff in any sense contracted, or otherwise, assumed the injury from the risks so encountered? Or as a matter of law, under all the circumstances, ought the court to have directed a verdict for defendant and refused to submit the issues upon the alleged defenses to the jury?

Merrifeld vs. Maryland Co., 143 Cal., 54; *Roth vs. Northern Pacific Lumbering Co.*, 18 Ore., 205, 22 Pac. Rep., 842.

The known youth and inexperience of plaintiff is an important element. It is admitted in defendant's brief that the instructions upon the duty of the master to warn and instruct given by the court (Tr., p. 270), states the law correctly; it is claimed that it was inapplicable, on the ground that there was no evidence on which to base the instructions. That there was such evidence, we have pointed out.

This instruction is most amply supported by the decisions of the courts of this state, among which are:

Ingerman vs. Moore, 90 Cal., 410, 421-422;
Foley vs. California Horseshoe Co., 115 Cal., 184;
O'Connor vs. Golden Gate, etc., Co., 135 Cal., 517,
 543-546;
Verdelli vs. Gray's Harbor, etc., Co., 115 Cal., 517,
 523-525;

Mansfield vs. Eagle Box, etc., Co., 136 Cal., 622, 624-626;

Jenson vs. Mill & Fink Co., 150 Cal., 500, 506-509;

Quinn vs. Electric Laundry Co., 155 Cal., 500, 506-509;

Larsen vs. Bloemer, 156 Cal., 752, 757-8;

Clark vs. Tulare Dredge Co., 14 Cal. App., 415, 430-431;

O'Connell vs. United Railroads, 19 Cal. App., 36, 50-51;

Jones vs. Florence Mining Co., 66 Wis., 277, cited in 90 Cal., 422.

But not only was there no semblance of care on part of the master to warn or instruct, but there was here an express order to this youth to mount this push-table, to disengage a jam, which was done in sight of the foreman and pursuant to his order; the youth was then given to understand that this was a continuous service demanded of him, as was in fact required. Then, too, it was an extra-hazardous service in addition to the employment for which he hired, and not a slight, but most inherently dangerous addition even without the presence of the X-board.

The instruction Number VIII given by the court adopted from that given in *Jones vs. Florence Mining Co.*, 66 Wis., 277, in the case of *Ingerman vs. Moore*, 90 Cal., 410, *supra*, has been since consistently followed in the cases above cited. And in the case of *O'Connell vs. United Railroads*, 19 Cal. App., *supra*, in quoting this oft approved instruction, the court italicized the following words therein: "*even with his own consent.*"

So that the fact shown by the evidence in this case, that the plaintiff willingly did what he was ordered to do and that he often followed the order without injury, does not relieve the defendant of liability, nor did it impose upon the court the duty to direct a verdict for the defendant.

Upon this subject what the court said in its opinion in *Foley vs. California Horseshoe Co.*, 115 Cal., 184, *supra*, makes a sufficient answer to the argument for the defendant herein that the court erred in the submission of the case to the jury, and in not directing a verdict for the defendant. See *ibid*, pp. 190-193.

In speaking of the youth of an employee, the court said among other things:

"In the factory or shop unquestioned obedience is expected and exacted. They must go where they are sent, they must do as they are told.

"It would be barbarous to hold them in the same accountability as is held the adult employee who is an independent free agent. Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act. And it must, from the nature of the case, be a question of fact for the jury rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability. This must necessarily give rise to a different rule from that so well established, which measures the conduct of the adult by that which might be expected of the ordinarily prudent person placed in the same position."

The court quotes with approval the following from *Turner vs. Norfolk Ry. Co.*, 40 W. Va., 675:

"A minor cannot be expected to set up his opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, but he is taught the lesson of obedience from his cradle, and he is required to respect the commands, and pay deference to the judgment of his elders, until legally emancipated at the age of twenty-one years. And it would be an extreme case in which a minor should be held guilty of contributory negligence in

obeying the orders of his foreman, representing his master.”

The Foley case is also instructive upon the bearing of the fact that this intrinsically dangerous work was required of plaintiff outside of the regular duties to perform which he was employed.

When in addition to all these elements of the sum total of defendant's negligence, there is considered the fact that it made no provision whatever for an appliance appropriate or otherwise, to mount the push-table, either over the revolving shaft, on the east side, or over the dog-roller, on the south side, to the choice between which approaches plaintiff was shut up and between which there was a choice to mount over the cart only when the load on it was “just right”, we submit that the court did not err in holding that it could not as a matter of law hold that the defendant either assumed by his contract the risk of the injury he sustained, or that he was guilty of contributory negligence.

The familiar rule by which the courts govern themselves in that regard, has been reiterated by the Supreme Court in the case of *Kreigh vs. Westinghouse C. K. & Co.*, 214 U. S., 249, 258, as follows:

“Questions of negligence do not become questions of law, to be decided by the court, except ‘where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.’ *Gardner vs. Michigan C. R. Co.*, 150 U. S., 349, 361, 32 L. Ed., 1107, 1110, 14 Sup. Ct. Rep., 140.”

In this connection we refer to the fact that Evenson, superintendent of the mill, who first employed the plaintiff, and who verified the amended answer of the defendant, and had the model of the mill in evidence constructed, and

must have assisted in framing the defense, and was therefore the most important witness for the defendant, was not called, nor the absence of his testimony accounted for. The fact that the proof is so far from supporting the answers verified by him makes the absence of the evidence of this chief witness an additional circumstance properly to be considered by the court as to whether the court ought to have submitted the case to the jury.

The Joseph B. Thomas, 81 Fed., 578, 584.

THE SECONDARY USE OF THE TERM "ASSUMPTION OF RISK" TO DESIGNATE A DEFENSE AGAINST RESPONSIBILITY OF THE MASTER FOR INJURIES TO THE SERVANT ARISING OUT OF THE MASTER'S NEGLIGENCE.

We do not overlook the fact that a vast body of case law has developed the doctrine of assumption by the servant of risks occasioned by the master's negligence. This secondary use of the term is altogether distinct from the use of the term to designate the assumption by the servant under his contract of hiring of the ordinary risks attending his employment.

In the cases when the latter and primary use of the term is proper, there is no negligence attributable to the master. Such are the cases relied upon in the brief for defendant.

But the secondary use of the term always presupposes negligence on part of the master as a contributing cause to the servant's injury which makes him *prima facie* liable; and this *prima facie* liability he may rebut by assuming the burden of showing what has been termed the "assumption" by the servant of the risk of danger brought about by the master's negligence.

There is an inherent conflict between the doctrine of the duty of the master to use ordinary care to provide a safe place and safe appliance for the prevention of the servant's

work, and this secondary doctrine of assumption by the servant of risks caused by the failure of the master to perform his duty. (See 3 Labatt on Master & Servant, 2nd Ed., sec. 893). Accordingly a great variety of theories of the nature of this secondary sort of assumption is exhibited by the decisions.

Some go upon the theory that the contract of hiring carries with it the implied agreement that the servant will abide all the risks of the master's negligence of which he becomes sufficiently advised in the progress of the work; others go upon a theory of public policy; others go upon the theory that by continuing the work with knowledge of the danger occasioned by the master's negligence, the servant impliedly agrees to waive any claim for injuries sustained in consequence of such negligence; others that where the danger is entirely obvious the servant by braving the danger becomes subject to the operation of the doctrine *volenti non fit injuria*. And others as in the Wisconsin case in 76 Wis., 120, *supra*, put such defense upon the ground of contributory negligence.

THE DEFENSE HERE ONE OF CONFESSION AND AVOIDANCE.

It is plain that this secondary doctrine of assumption of the risk caused by the master's negligence, is that upon which defendants rely. But the authorities cited by them are applicable only to the primary doctrine of the assumption of risk in which the defense goes upon the theory that there was no negligence on part of the master, and have no application to the defense of this secondary assumption.

The defense argued here is one of confession and avoidance, not of denial of the negligence of defendant.

It is unnecessary to discuss at length as to what is the true theory of this secondary assumption of risk as a defense by way of confession and avoidance.

What is of immediate practical importance is the dominant fact that Section 1970 of the Civil Code of this State as amended and in effect March 6, 1907, (Stat. 1907, p. 119), *sets a definite bound to the scope of this defense of confession and avoidance.*

THE IMMEDIATE PRACTICAL IMPORTANCE OF THE AMENDED SECTION 1970, CIVIL CODE.

We next undertake to examine what this bound is, and submit that in refusing to direct a verdict for defendant, and in framing its instructions and submitting the case to the jury, the court but obeyed that statute, as well as followed the general law applicable to the case.

THE BEARING UPON THE CASE OF SECTION 1970, CIVIL CODE, AS AMENDED MARCH 6, 1907.

We have set out this statute as amended in an appendix to this brief, and have caused to be enclosed in brackets the addition made by the amendment to the original section 1970 of the Civil Code. The original section, ending with the words "culpable employee" in the first paragraph remained. The remainder of this statute as it now stands, constitutes the amendment.

Counsel for the defendant contend that the amendment in no wise changes or modifies the law upon the subject of assumed risk or of contributory negligence; and in support of the contention quote largely from the case of *Hall vs. Clark*, 163 Cal., 392. In that case assumption of risk was not a defense alleged. The statement of the defense as given in the opinion, page 393, is as follows:

"The answer of the defendant denied the allegations of the complaint *and set up the defense of contributory negligence.*"

What is said in the opinion is to be construed as addressed to the issue of contributory negligence. That it

was correctly decided under the amended section 1970 cannot be questioned. But it was so decided because

“No ordinarily prudent person of similar age and experience, situated as was the employee, would have done the act even though ordered by his employer to do it.” (*Ibid*, p. 396.)

In other words, an experienced teamster, twenty-six years of age, who in compliance with the direction of the foreman, deliberately drove his team over a bank into an excavation, was guilty of contributory negligence. Indeed, that is what the court explicitly held (*Ibid*, p. 397), where it said of the admitted facts:

“They are such as to require the conclusion as matter of law, that the plaintiff was guilty of contributory negligence in obeying the order that he testified was given him by the foreman.”

The case, therefore, is not one involving the assumption of risk in either of the senses in which that term has been used. We submit that the facts in that case and in the case of *Limberg vs. Glenwood Lumber Co.*, 127 Cal., 598, decided before the statute of 1907, are so dissimilar to the facts in the case at bar, that they are no authority for the proposition that either the assumption of risk or contributory negligence were so clearly established in this case as to become a matter of law.

Returning to the consideration of the amended section 1970, the second paragraph of the section is as follows:

“Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and

thereafter consented to use the same, or continued in the use thereof."

The fourth and fifth paragraphs are as follows:

"Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative of any right or remedy to which he is now entitled under the laws of this state.

"The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

It will be thus observed, that not only does the said second paragraph confine the bar to recovery to cases where the employee has full actual understanding, comprehension and appreciation of the dangers by reason of the negligence of the employer in furnishing the defective machinery, ways, appliances or structures, and thereafter consents to use the same or continues in the use thereof, but the fourth paragraph declares that any *implied* contract or agreement by any such employee to waive the benefit of the section or any part thereof shall be null and void.

It thus precludes in the most positive manner the very element which counsel insist in their brief should have been embodied in instructions V, VI, VII, VIII and in other instructions in the record, as to which there is no insistance in argument. In other words, defendant insists that notwithstanding the statute, the test of a servant's right to recover is *whether he ought to have fully understood, comprehended and appreciated the danger in question by the use of ordinary care*, and not *whether he did in fact understand, comprehend or appreciate*, as the statute provides.

What counsel insist upon is that the servant is held by virtue of what is implied in this contract, to *constructive* understanding, comprehension and appreciation of the danger caused by the master's negligence, even though there is entire absence of *actual* understanding, comprehension and appreciation.

But when do counsel claim that such *constructive* understanding, comprehension and appreciation becomes chargeable to the servant? They answer, when by the exercise of ordinary care to discover the master's negligence and the danger consequent upon it he might have derived a full understanding, comprehension and appreciation of such danger. But we submit that the requirement of constructive understanding, comprehension and appreciation is precisely what the statute precludes. It rejects the doctrine that it is incumbent upon the servant to use ordinary care to learn the master's negligence and the consequent dangers in its train. We submit that what counsel insist on as error, in that the court did not introduce into the instructions V, VI, VII, VIII or any other instruction given, language of the purport in the italicized words taken from the exception to said instruction VI (Tr., p. 237) as the illustration of what is insisted upon in the exceptions to all the said instructions, would have been error if it had been embodied as insisted. The illustrative quotation is as follows:

"The servant not only assumed the risk of working with unsafe machinery in an unsafe place, which he fully understood, comprehended and appreciated the dangers incident thereto, *but also assumed the risk of working with defective and dangerous machinery where he would have fully understood, comprehended and appreciated the danger incident thereto if he had exercised ordinary care and caution.*"

Or, as put in the exception to instruction VII (Tr., p. 238) which demands the qualification of the language of the statute itself, by introducing the following:

“A servant assumed the risk of the danger incident to working about defective or unsafe ways, machinery, appliances or structures *which the servant should have fully understood, comprehended and appreciated if he had exercised ordinary care.*”

The exceptions to instructions V (Tr., p. 236), VIII (Tr., p. 239), XVI (Tr., p. 246), XVII (Tr., p. 247), and XVIII (Tr., p. 249) are similar.

We submit that, however it may be in other jurisdictions, neither this statute, nor the decisions of the courts of last resort in this state, nor of the United States Circuit Court of Appeals for this circuit, nor the decisions of the Supreme Court of the United States tolerate the doctrine that it is incumbent upon the servant to use ordinary care to discover dangers and perils occasioned by the master's negligence. There can be no question but that the second paragraph of the section 1970 means that knowledge of the defective or unsafe character or condition of the machinery, ways, appliances or structures of the employee shall not be a bar to recovery, unless it shall also appear that the employee *in fact* fully understood, comprehended and appreciated the dangers, and thereafter consented to use the same or continued to use.

Nor can there be any question but that the penultimate fourth paragraph of the said section declares all implied agreements to waive the benefits of any part of the section to be null and void. Among these benefits certainly is the provision that only actual and not implied or constructive understanding, comprehension and appreciation shall bar recovery.

In *Silveira vs. Iversen*, 128 Cal., 187, 192, the court said:

"If possible, it would have been still worse had the court given the instruction that plaintiff could not recover unless defendant knew, or ought to have known, of the defect, and the plaintiff had not equal means of knowledge. *The employee is not required to use any degree of care or diligence to discover defects.* He will be held to have assumed the risk only when he knew, and will be held to have known when the defect was so obvious that he must have known or simply refused to open his eyes and see; or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness to neglect."

See *Bunker Hill & Sullivan Min. Co. vs. Jones*, 130 Fed., 813, as to the holding in this circuit.

In *Choctaw O. & G. R. Co. vs. McDade*, 191 U. S., 64, the opinion states, p. 67:

"The court left to the jury the question of assumption of risk upon the part of McDade, with instructions which did not prevent of recovery if he either knew of the danger of collision with the water spout, *or by the observance of ordinary care ought to have known of it.*"

The court said with respect to this:

"The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required as it exonerated the railroad from fault if, *in the exercise of ordinary care*, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee;" citing *Texas & P. R. Co. vs. Archibald*, 170 U. S., 665.

In that case the Supreme Court approved the striking out from two instructions the words in one "*by the exercise of ordinary care could have known*," and in the other "*or could have known by the exercise of ordinary care.*" (170 U. S., 665, 671.)

The discussion of the matter is full and instructive, *ibid*, 671-674. In course thereof, the court cites with approval the case of *Missouri Pac. Ry. Co. vs. Lemberg*, 75 Tex., 67.

AS TO THE BEARING OF THE STATUTE ON THE DEFENSE OF CONTRIBUTORY NEGLIGENCE.

In the last paragraph of the amended section 1970 it is provided that:

“The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, *except in so far as the same are herein modified or changed.*”

The case of *Hall vs. Clark*, 163 Cal., 392, was a case of such gross and flagrant negligence on part of the plaintiff that the court felt bound to say, as a legal conclusion, that the employee did fully understand, comprehend and appreciate the excavation. That case, however, is no authority for the proposition that where the defense is confession of negligence by the master and his counter plea in avoidance of contributory negligence on the part of the servant, that the jury should be instructed that it was the servant's duty to exercise ordinary care to search out and obtain a full understanding, comprehension and appreciation of the danger arising from the master's negligence, particularly in a case like this where the proximate cause of the injury was an extraneous thing like this X board, which was not an appliance or instrument which the servant was himself engaged in using. See the pregnant reference to this subject in the opinion of the court in *Texas & Pac. Ry. Co. vs. Archibald*, 170 U. S., *supra*, at page 674.

In what the court said, at the bottom of page 672, it is to be inferred that the nature of the defense in such cases based on consent of the employee to use or continue in

using defective appliances where the dangers from the use is fully understood, comprehended and appreciated, is by it considered to be contributory negligence rather than assumption of the risk in the primary and true sense of the term. In this respect the view of the court seems to approach that of the Wisconsin court as expressed in *Nadau vs. White R. Lumber Co.*, 76 Wis., 120, *supra*.

We submit that the court did not err in excluding from instructions given, numbers V, VI, VII and VIII, insisted upon in the argument, or from any other instructions, the statement that it was incumbent upon plaintiff to exercise ordinary care to discover the dangers resulting from the master's negligence.

CONCERNING THE DEFENDANT'S EXCEPTIONS TO INSTRUCTIONS.

1. The giving of the instruction number V (Tr., p. 233-234) was excepted to at the trial, and said exception is insisted upon in argument. So far as that exception rested upon the fact that there was not embodied therein a statement that the servant assumed the risk of all negligence of the master which he should by the exercise of ordinary care on his part have known, fully comprehended, understood and appreciated, it has already been discussed. As to the objection that this instruction should have embodied matter which is contained in the next instruction, number VI (Tr., p. 236-237), it is sufficient to say that it is not required to state the whole law of the case in a single instruction.

2. No exception was taken at the trial to instruction number VI, except on the ground that it did not embody the proposition that the employee is bound to use ordinary care and caution to understand, comprehend and appreciate the danger consequent upon the master's negligence. This we have also discussed.

3. The exception to instruction VII insisting upon the same vice, that it was incumbent upon the servant to exercise ordinary care to understand, comprehend and appreciate the risk and danger arising from the master's negligence, we submit on what has heretofore been said. We also submit that the exception at the trial was confined to that particular exception, and therefore if there were any substance in the objection to the statement in instruction VII, that the statute applied to the consideration of the entire evidence in its bearing upon all the issues in the action, no such exception was taken at the trial, and the same is not available now.

But we may point out that inasmuch as one of the charges of negligence in the complaint is of failure to warn and instruct the plaintiff, a minor, as to the risks incurred, and as this has a direct bearing upon the question of the understanding, comprehension and appreciation of the danger and so upon the question of the assumption of the risks arising from the master's negligence and also upon the defense of contributory negligence, there can be no possible error or prejudice to defendant in the statement of the court that the statute may be considered in its bearing upon all the issues in the case. We submit that there was no error in this instruction.

4. The exception to instruction number VIII (Tr., pp., 238-240) is based upon two grounds, first: that it limited the jury to inquiries of the actual understanding, comprehension and appreciation and did not include a direction to the jury to inquire whether the plaintiff should have fully understood, comprehended and appreciated the danger if he had exercised ordinary care; second, that there was no evidence to warrant the second paragraph of the instruction.

Both these elements we have already sufficiently discussed. The brief admits that the instruction states the cor-

rect rule of law which the authorities we have hereinbefore set out amply demonstrate. We submit that there was ample evidence to warrant the giving of said instruction.

5. As to the exception to the refusal of the court to give instruction VI requested by the defendant (Tr., pp. 254-255), we submit that the substance thereof is included in the instruction number X given (Tr., pp. 241-242) to which no exception was taken.

We further submit that the instruction X given is more favorable to the defendant than the requested instruction VI not given.

6. The statement that the court refused to give the instruction VIII requested by the defendant (Tr., pp. 256-257) and argued in the brief, pp. 85-88, rests upon an entire misapprehension, as the identical instruction was given in number XI (Tr., p. 242).

7. As to the exception that the refusal of the court to give the requested instruction XI (Tr., p. 259), we submit that said proposed instruction assumes as a fact that the method of mounting the push table by climbing upon it by means of lumber buggies was a safe way, and that it merely submits the question whether plaintiff had knowledge of what the instruction alleges to be the fact that climbing up over the buggies was a safe way; and later on in this instruction it is even assumed that the plaintiff knew as a fact that the alternate way of climbing up upon the push table over the buggies was known by him to be safe. In all these respects it would have been an invasion of the province of the jury.

The instruction is objectionable further, because there is no evidence in the record tending to show that the condition of the load or part of a load of lumber upon a lumber buggy at the time that the injury was sustained was, in the

phrase of both the plaintiff and witness for the defendant Kilty, "Just right" to make it feasible to mount the push table over the buggy. This matter we have heretofore discussed.

We submit that the court did not err in refusing to give this requested instruction XI, and that the whole matter is properly covered by the instructions numbers X (Tr., pp. 241-242), XIII (Tr., pp. 243-244), XVI (Tr., p. 246) and XVIII (Tr., p. 248).

No other exceptions to the giving or refusing of instructions than those above noticed are assigned in the brief or argued. We therefore are, we take it, not called upon to argue as to those not insisted upon.

CONCLUSION.

When this employer who, by what amounted to compulsion, subjected a youth of 17 years day after day, to risk life and limb outside of and in addition to the strenuous regular work for which he was engaged, by requiring him to mount upon a push table but four feet wide upon which all kinds of lumber, the major portion of the product of a sawmill, was being precipitated by the propulsive force of machinery adding to the force of gravity, to relieve by his hands the clogging and jamming of lumber caused by the defective operation and installation of that machinery, and while it was moving, and in order to keep it moving; where this requirement involved the surmounting of an elevation of 5 feet 7 inches, without provision of any means for doing so, but leaving the youth to get up as best he could, taking advantage of the accidental conditions of the environment; where the employer saw him mount in a certain way when ordering him to do so, and saw him going up the same way time after time; and when finally, in so mounting, the foot of this youth was caught by a useless and extraneous plank fastened to the table, and was

by such plank held against a spiked roller revolving in the table, and torn off; when such employer virtually admits its negligence, but insists that as a matter of law its affirmative defenses of assumption of risk and contributory negligence are so clearly made out that no reasonable mind could draw any conclusion to the contrary,—the answer is to point out the self-evident outrage upon an obedient and inexperienced youth that such work should have been imposed on him at all.

It is no wonder that the amended answer discloses the consciousness of this overshadowing fact, by making its repeated denials in every possible form of negation that plaintiff was ordered, expected, required or permitted to mount this push table; no wonder that the superintendent of the mill who verified this answer has not testified in this case. For with the breaking down of that defense, as it did most absolutely, there disappeared any real defense to this action.

The afterthought on the day of the trial, that at any and all times climbing up from or over a lumber buggy was a safe and practicable means of mounting the push table, the necessity for which was at that late date admitted, was a lame substitute for the defense contained in the verified amended answer that plaintiff was not even permitted to mount the push table. For, as we have pointed out, the attempt to mount in that way, unless the load upon the push cart happened to be of a height “just right”, involved danger greater even than that of mounting from the carrying table. Doubtless, if plaintiff, in attempting to climb up from an empty push cart, had had his hands crushed, or his brains knocked out or his clothing wound up in the revolving shaft, the defense then would have been that he ought to have gone up over the carrying table.

The more minutely the facts of this case as implied in the verdict of the jury, and the supporting evidence, are

examined, the more we are persuaded will appear the wisdom and humanity of the rule established in this state by an unusual array of concurring decisions, that it was actionable negligence to expose this youth, and that by direct order, as this youth was exposed, to the risk of life and limb "*even with his consent*". For there was no true consent, and the jury found, and were fully justified in finding, that the plaintiff obeyed, without understanding, comprehending, or appreciating the dangers to which his obedience exposed him.

We most respectfully submit that the learned District Court in its refusal at the trial to direct a verdict for the defendant, and in submitting the case to the jury, and in its refusal upon subsequent application to set aside the verdict, was guided by correct principles of law.

We, also, most respectfully submit that the instructions given fairly, fully and correctly covered the whole case, and that judgment of the court below should be affirmed.

Respectfully submitted,

HUNSAKER & BRITT,

HAINES & HAINES,

BY A. HAINES,

Attorneys for Defendants in Error.

APPENDIX.

CHAPTER 97.

An Act to Amend Section 1970 of the Civil Code of the State of California, relating to the responsibility of employers for injury to or death of employees.

[Approved March 6, 1907.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Section 1970 of the Civil Code of the State of California is hereby amended so as to read as follows:

1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; [*provided*, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a coemployee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch signal point, locomotive engine, or other appliance than that upon which the employee is injured is employed, or who is charged with dispatching trains or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine shop, or other industrial establishment.

Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continue in the use thereof.

When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery.

Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed.

SEC. 2. This act shall take effect and be in force from and after its passage.]

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Benson Lumber Company, a corporation,

Plaintiff in Error,
vs.

H. C. McCann, by Jesse F. McCann, his Guardian ad Litem,
Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

GIBSON, DUNN & CRUTCHER,
By NORMAN S. STERRY;

WRIGHT & WINNEK,

By LEROY WRIGHT,
Attorneys for Plaintiff in Error.

Clerk.

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STATEMENT.

After this cause had been orally argued a stipulation was filed and an order entered thereon giving defendant in error until November 3rd and plaintiff in error until December 3rd, 1914, in which to serve and file supplemental briefs. Defendant in error served his brief in due time, but not upon counsel having the matter in charge, and through an inadvertence it was not called to his attention. This brief was prepared upon the assumption that defendant in error had abandoned his intention of citing additional authorities or

advancing further argument. After this brief was set in type the supplemental brief of defendant in error was called to the attention of counsel. Considering all the circumstances, including the desire of both parties for a speedy decision, it seems best to us to present the brief as prepared, noticing first the authorities relied upon in the original brief of defendant in error, then the decisions cited in his supplemental brief. After all this is perhaps the logical course.

We have not examined the numerous decisions cited to the effect that a master must exercise reasonable care to furnish to his servants a safe place in which to work; that he cannot delegate this duty; that where a defendant is negligent it is no defense that the negligence of a third person also contributed to the plaintiff's injuries. We do not challenge any of these well settled rules.

As we read his brief there is no reply to our claim that if defendant in error did not fully appreciate the danger of the work, his lack of appreciation of his peril was due entirely to his want of any care and prudence, to his blindly closing his eyes to obvious danger and that he was therefore guilty of contributory negligence. Hence we will leave that issue to the discussion on pages 45 to 46 and 73 of our opening brief, confining ourselves entirely to the decisions cited upon the issue of assumed risk.

I.

Authorities Cited in Original Brief of Defendant in Error.

It will be recalled that the defendant in error was injured while attempting to step from the carrying table to the push table, over a revolving dog roller. He knew of the location of both the roller and the "X" board, and that the former was in motion, and had stepped over them many times before.

At the oral argument learned counsel for defendant in error frankly admitted that the defendant in error, when he attempted to go from his platform to the push table, assumed the risk of having his foot struck by the dog roller; assumed the risk of being struck and injured by the lumber which was moving rapidly upon the tables; assumed every risk incident to his perilous attempt except the one which produced the injury, viz., getting his foot caught between the "X" board and the roller; because the "X" board was unnecessary to the operation of the machinery and its presence was therefore an added danger, due to the negligence of the employer; that an employee never assumed the risk of the negligence of the employer. Indeed, defendant in error placed his entire defense of the judgment upon this single proposition, regardless of whether the danger arising from the master's negligence was so open and obvious that the servant must necessarily have fully understood and appreciated the same. Neither reason, nor the decisions relied on by him, sustain his contention.

At first blush, some of the quotations in his brief seem to lend him support, but an examination of the decisions not only discloses that they do not support the contention, but hold the exact contrary. It is the single purpose of this brief to demonstrate this by an analysis of those authorities.

Before discussing the cases, we beg leave briefly to point out the illogic of the position of defendant in error. If his contention were sound, the defense of assumed risk would be useless, for, wherever the risk was the result of the negligence of the employer, then the servant would not assume it. If there was no negligence on the employer's part, the servant could not recover, regardless of whether he did or did not assume the risk.

In our opening brief we cited many decisions to the effect that the servant assumes all risks of which he knows or should know by the exercise of ordinary care. Defendant in error has cited many decisions holding that it is not correct to say that an employee assumes risks which he should know by the exercise of ordinary care, that he is not required to inspect the master's premises to ascertain if they are safe. These decisions are not in conflict, each announce the same rule in different terms. Broadly speaking, the servant, in the first instance, may rely upon the assumption that the master has discharged his duty to furnish a safe place in which to work. The servant is not required to anticipate or search for latent or hidden defects. On the other hand, he assumes not only the risks which are openly and

obviously incident to his employment, but all risks which arise from any defect caused by the master's negligence, where such defect and the danger incident thereto are known to the servant or so patent that he must be presumed to know of them. He can not wilfully close his eyes to dangers which are plainly before him and which he would discover and know of if he exercised ordinary care in doing his work. These rules are recognized and enforced alike by the decisions which we have cited and those relied upon by defendant in error.

We will examine first the federal decisions, and then those cited from the state courts. (The italics throughout are our own.)

Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. Ed. 97, 100 (cited by defendant in error on page 43 of his brief).

Deceased, a brakeman on defendant's train, on a dark night was killed while riding on a furniture car which was higher than the average car upon the road. He was struck by a spout to water tank which was negligently constructed so as to project across the track in such a manner as to strike any one riding on a car. If properly constructed it would not have so projected. The deceased had been over that portion of the road only a few trips, and that after dark.

The court held that the evidence did not irresistibly force the conclusion that the deceased either knew or must have known of the spout or of its negligent con-

struction and therefore could not as a matter of law be held to have assumed the risk of his injury, saying (the first portion of the quotation is printed by defendant in error) :

“The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer’s negligence in performing such duties. The employee is not obliged to pass judgment upon the employer’s methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. *This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master’s employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover.*”

Hawley v. C. B. & Q. Ry. Co., 133 Fed. 150, is similar in all respects to the case of Choctaw, Oklahoma etc. Co. v. McDade, *supra*.

Great weight is placed by defendant in error upon
Bunker Hill etc. v. Jones (9th Circuit), 130

Fed 813, 819,

because it is a decision by this court.

On page 48, a portion of the decision is quoted to the effect that a servant may rely upon the master to perform his part of the contract, viz., to use ordinary care to furnish the servant a safe place in which to work. An examination of the decision shows that the court did not attempt to lay down any different rule from that announced in the McDade case, or the decisions cited in our opening brief. The plaintiff was a minor, working in the stope of a mine. He was severely injured by the fall of rock. The principal dispute was from what point the rock fell. The plaintiff there claiming that the rock fell from the ceiling overhead due to insufficient timbering. The defendant that it fell from the side of the wall, and was caused to so fall by the negligent way in which the plaintiff was doing his work. The jury having decided the disputed issues of fact in favor of the plaintiff, this court refused to hold that the plaintiff, as a matter of law, assumed the risk of his employment, saying in part:

“It does not appear from the evidence that the defendant in error could have discovered that the roof of the stope was in danger of caving, without a particular inspection thereof, or that the timbering was insufficient to secure the loose rock above. It was not his duty to timber the mine, or to pay any attention to that work, *unless it was obviously defective, in his understanding, in the immediate vicinity of his work.*

That duty belonged exclusively to the defendant, and the question whether or not it exercised reasonable care in its fulfillment was properly submitted to the jury.”

In

Texas Pacific Ry. Co. v. Archibald, 170 U. S. 665, 42 L. Ed. 1188 (cited by defendant in error on page 47 of his brief),

plaintiff was injured through the breaking of a rod due to a defect therein while coupling cars. The defect could have been discovered by a reasonable inspection by defendant. It was not a patent or obvious defect and would have required investigation on the part of the plaintiff to have discovered the hazard. The Supreme Court held that an employee is not compelled to make investigations or pass judgment on his employer's methods of doing business and has a right to assume that reasonable care will be exercised to make appliances safe; but this rule is subject to the exception that if in an appliance there exists a defect *known to the employee or plainly observable by him, he cannot recover for an injury caused by such defect*, if with knowledge he negligently continues to use the defective appliance. In this case the Supreme Court expressly holds that the law does not relieve the employee from observing patent defects in appliances with which he is working.

San Francisco etc. Co. v. Carlson, 161 Fed. 581, 584 (cited on page 48 of the brief of the defendant in error).

This case does not seem at all in point, and apparently has no bearing on the case whatever. We do not know why it is cited.

Hough v. R. R. Co., 100 U. S. 213, 217 (cited in brief of defendant in error on page 45), Does not deal with the assumption of risk or defective places of work or appliances, but with the defense of fellowship of servants. The action was for the death of plaintiff's decedent, an engineer. It was held that the master mechanic and the men under him were not fellow-servants of a locomotive engineer.

The defendant in error, on pages 45 and 46 of his brief, prints the following quotation from

C. M. & S. P. R. R. Co. v. Ross, 112 U. S. 377, 383:

“But however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence.”

The above quotation would apparently support the contention of the defendant in error, but the court was not there speaking of assumed risk, but was again treating on the defense of negligence of fellow-

servants, and it has always been the law that, unlike contributory negligence, the concurring negligence of a fellow-servant does not bar a recovery where the master personally has been negligent.

Kreigh v. Westinghouse, 214 U. S. 249 (cited by defendant in error on page 43 of his brief).

Plaintiff, a bricklayer, was injured by reason of a derrick being negligently equipped with one rope instead of three. He did not know this and from where he worked could not see the ropes on the derrick.

We come now to the California decisions relied on by defendant in error.

Bone v. Ophir Mining Company, 149 Cal. 293, 294 (cited on page 34 of the brief of defendant in error);

Baxter v. Roberts, 44 Cal. 187, 192 (cited on page 42 of the brief of defendant in error);

Merrifield v. Maryland Company, 143 Cal. 54 (cited on page 50 of the brief of defendant in error),

involve dangers that were unknown to the respective plaintiffs. In each case the cause of the personal injury was not open and obvious and could have been discovered by the person injured only upon investigation. In Merrifield v. Maryland, the question of assumed risk does not appear to have been advanced or considered. These decisions are, therefore, without weight or value in determining any issue in the case at bar.

Schellin v. No. Alaska Salmon Co., 47 Cal. Dec.

138, 140, 138 Pac. 723, 735 (cited on pages

42 and 43 of the brief of defendant in error),

is greatly relied on by defendant in error, and is an extremely interesting decision because of the fact that it was decided long after the amendment of 1907, and because of the further fact that the Supreme Court of California announced the rule as we have heretofore claimed it to be, viz., that the servant is not required to seek or hunt for latent danger which he has no reason to suspect, but that where the danger or defect is obvious he assumes the risk thereof. The facts were that plaintiff had been hired to go to Alaska to work in a cannery; when plaintiff entered the employment of the defendant he was unfamiliar with machinery, but knew he would have to run a gasoline engine; before he was put to work running the engine he was instructed in its operation and also in putting on a belt upon a pulley while the machinery was in motion. The machinery had all been constructed before plaintiff went to work. While plaintiff was running the engine he noticed the belt was off the pulley, and, ascending the running board, attempted to adjust the belt upon the pulley. His clothing was caught by a set screw which projected about $\frac{3}{4}$ of an inch from the collar upon the shafting. Plaintiff had never seen this set screw; did not know that it was upon the collar. The evidence showed that it could not be seen when the machinery was in motion. The set screw performed no function whatever upon the ma-

chinery and was utterly useless. The court held the question of his assumption of risk was for the jury.

The court said, as quoted in plaintiff's brief:

"The collar and set screw performed no functions. Their presence at that place made it one of great danger to plaintiff, and it was defendant's duty to make and to maintain there as safe a place as reasonably was possible."

Adding:

"The shafting had been erected before plaintiff was put to work. *Of course, if there had been a danger so obvious that plaintiff must have seen it, and assumed the risk of working in proximity to it, he could not recover.* * * *

"If plaintiff was, as he testified, ignorant of the existence of the set screw, he was under no obligation to investigate. *Majors v. Connor*, 162 Cal. 135, 121 Pac. 371. The rule of assumption of risk by an employe does not apply *where the danger is not obvious, where it is unknown to the employe, and where by the exercise of ordinary care the employer could have discovered and removed it.*"

But we submit that the rule does apply to the case at bar, for here the defect and the danger was open, obvious and apparent, and fully known to defendant in error. There is no claim that he did not know of the existence of the dog roller or of the "X" board. On the contrary, he stated many times that he knew of their presence; knew the roller was shod with iron spikes, and made one hundred to one hundred and fifty revolutions a minute. He constantly saw it forcing

heavy lumber from the table; knew that if his foot came in contact with it, injury would result. Counsel at the oral argument conceded that defendant in error assumed the risk of injury from having his foot struck by the roller, but contended that he did not assume the equally apparent danger of having his foot caught between the roller and the "X" board. We think it preposterous to say that he had sufficient comprehension to appreciate the danger of having his foot struck by the roller, and yet did not appreciate that the roller would also injure his foot if he got it caught between the roller and a board which he knew was within an inch of the roller. Under the most liberal interpretation of the rules announced by the decisions which he cites, he must be held to have assumed the risk of his unfortunate injury.

Jacobson v. Oakland Meat etc. Co., 161 Cal.
430.

Plaintiff, while working in an ill-lighted room where it was difficult to see, was injured because guards to certain gears had been removed. It was fairly debatable whether the plaintiff knew of the absence of the guards. The obvious distinction between that case and the one at bar is pointed out in

Bresette v. E. B. & A. L. Stone Co., 162 Cal.
74, 78,

which is quoted from at length in our opening brief and which, we submit, has not been distinguished from the case at bar.

On page 44 of the brief of defendant in error, is a very deceptive quotation, due to a printer's mistake. Without proper spacing, an excerpt from

Skelton v. Pac. Lumber Co., 140 Cal. 507, 510, is run with an excerpt from Nash v. Dowling, erroneously cited "North" v. Dowling, 93 Mo. App. 156.

Skelton v. Pac. Lumber Company does not involve the question of assumed risk. The action was for the death of plaintiff's intestate, occasioned by the bursting of an emery wheel which was caused to be run at a too high rate of speed by the superintendent of the factory. The only question which was discussed in the case was as to whether such superintendent was a fellow servant or vice-principal of the deceased. In discussing this matter, the court said, as shown by the quotation in the brief of the defendant in error:

"A servant, of course, takes upon himself all the ordinary risks and perils of accident in the common course of the service in which he is engaged."

Immediately following the quotation, and without proper space, is a quotation from

Nash v. Dowling, *supra*, 93 Mo. App. 156, to the effect that if the master's negligence aggravates the danger, the servant does not assume the risk of his injury.

But the Missouri court was there dealing with a case where a servant had been furnished a defective appliance; had complained of that defect to the employer; and the employer had urged him to keep on with his work, promising that the defect should be repaired. While it is perhaps inaccurate to say, as the

Missouri court did, that where the master's negligence aggravates the danger, the servant does not assume the risk, still it is a universal rule of law that, where an employe complains of a defect, and the master requests him to continue in the employment, promising to repair it, that, for a reasonable time within which the defect might be repaired, the servant does not assume the risk.

The Supreme Court of California points out the logical reason for this rule to be that where the servant knows of the defect and complains of it, and the employer allows the employee to continue work, assuring him that the defect will be repaired, the employer thereby agrees for a reasonable time to assume the risk of the servant being injured by the defect. See:

Anderson v. Seropian, 147 Cal. 201, 208, 209.

In that case the court, in part, said:

"The general rule undoubtedly is, that one who remains in the service of his employer after notice of a defect in the machine he is operating which increases the danger to which he is exposed, assumes the risk which the defect increases.

"But there is a marked distinction in law between a case where the employee knows when he contracts to operate a machine, that it is defective, or a defect is subsequently disclosed in its operation, to which he does not call the attention of his employer, but continues to operate it in its defective condition, and a case where the machine, when he takes charge of it, is in good condition, but a defect subsequently arises

which is called to the attention of the employer, and the employee continues to operate it under a promise that the defect will be remedied.” (P. 208.)

It is readily observed that the case of *Nash v. Dowling*, *supra*, has no bearing on the one at bar, for here there not only is no suggestion by the defendant in error that he ever objected to the structure, or to the uncovered dog roller, or the “X” board, but, on the contrary, it affirmatively appeared that he did not make any complaint.

“I had one order, that was to get up and get that board out. Mr. Keltie, the foreman, he came and gave me that order; that was before that accident. That was the only order I ever had about it. Mr. Keltie was our foreman. I never spoke to him or asked him if there was any way of getting up except over this dog roller. *I never made any complaint to anybody about it.*”

[Trans. of Rec., pp. 114-115.]

This brings us to the decisions of courts of sister states. As this brief was originally prepared, the facts of all these decisions were set forth and commented on. The space necessary, however, to note the California and federal decisions cited in the supplemental brief of defendant in error, is such that we feel that we would not be justified in discussing each of these authorities. Nor could any useful purpose be subserved thereby. The accident occurred in the state of California; and was tried in the federal courts. If the decisions of other states announced any different

rule from that established by the Supreme Court of California and the federal courts, they could not, of course, control this case. They do not, however, promulgate a different rule. We have examined each and all of them, and without exception, wherever a recovery had been allowed, the servant was injured through some concealed or latent defect of which he did not know.

To sustain his contention that the employee does not assume the risk of the master's negligence, defendant in error, on page 47 of his brief, quotes from the decision of the Supreme Court of Massachusetts in 168 Mass. 408, 47 N. E. 111-112, to the effect that the servant assumes all ordinary risk incidental to his business. That case can be of little comfort, for there it was held that where a servant was informed that the employer in a certain room was burning a patent fuel, and that the defendant did not know whether it emitted dangerous gases or not,—the servant assumed the risk of being asphyxiated by the escape of nauseous gases from the stove.

In

Nadeau v. White Lumber Co., 76 Wis. 120, 43
N. W. 1135,

the court, in addition to the quotation appearing on pages 44-45 of the brief of defendant in error, said:

"The employee, when accepting an employment, assumes all the risks that are reasonably incident to such employment, and no other, *unless the unusual and unreasonable risks of such employment are open and visible, and known to and comprehended by the em-*

ployee; and in such case, he assumes all the risks so known to him, whatever they may be."

We believe the foregoing are all of the authorities cited by the defendant in error on the question of assumption of risk. It is apparent that they do not sustain his contention.

As we have heretofore attempted to show, both in our brief and oral argument, the "X" board was undoubtedly placed before the roller to prevent the clothes of employees from being caught in its teeth. But if we are in error, and the board served no useful purpose and was there as the result of the positive negligence of the employer, still the danger incident to its position near the roller was a danger not only which defendant in error could have seen, but one which he actually did see. Under these circumstances, all of the authorities, those cited by the defendant in error, as well as those relied on by us, deny his right to recover.

In our original brief, pages 48 to 65, we called the court's attention to many decisions both of the federal and state courts, where minors, much younger in years than the defendant in error, and greatly lacking his knowledge of and experience with machinery, were held to have assumed the risks of their injury, where the same were as apparent and open, as in the case at bar.

No attempt has been made by the defendant in error to break the force of the many well considered authorities cited by us, or distinguish them from the case at bar other than by his oft repeated assertion that an

employee does not assume the risks of the master's negligence. The foregoing review of his authorities shows, not only that they do not support this contention, but that the learning and industry of his counsel have been unable to find a single decision where, under facts similar to the case at bar, recovery has been allowed. We feel that we might, with perfect safety, consent that the numerous decisions cited by us, applying the settled rules of law to facts similar to those in the case at bar, be entirely disregarded, and the cause submitted alone upon the authorities cited by the defendant in error. While most of those decisions, under the facts then before the court, allowed a recovery, still, each and all of them, with a surprising uniformity, lay down the rule that the employee assumes not only all risks incident to his business, but all risks arising from the negligence of the master, where the defect and danger incident thereto is either known to the employee, or is open, obvious and apparent. Applying this rule to the case at bar, we think it is perfectly clear that the judgment cannot be maintained. Had the "X" board been concealed from the defendant in error, so that his foot was caught between the dog roller and an obstruction of which he did not know, a different case would be presented, but, as we have repeatedly pointed out, the "X" board was in his plain sight. He not only could have seen it, but actually did see it and actually knew that the roller was revolving within an inch of the board. When he undertook to go upon the push table he intended to step clear of both the board and the roller. His in-

jury was caused, not by a failure to comprehend the danger of getting his foot caught between the roller and the board, but by failing, for some reason, to carry out his intention of stepping over both of them.

As heretofore remarked, learned counsel for the defendant in error tacitly concedes in his brief, and, at the oral argument, frankly admitted, that when the defendant in error undertook to go upon the push table he assumed all of the risks of being injured by the movement of the endless chains in the carrying table, of being struck by the lumber upon either table, of being struck and injured by the revolving dog roller, but claimed that he did not assume the risk of getting his foot caught between the board and the roller; not because the same was not open and apparent to him, but because such danger was one due to the negligence of the master and therefore not assumed. As we have seen, the authorities which he cites do not support this proposition, but hold the exact contrary. It is absurd to say that the defendant in error had observation, discretion and experience sufficient to appreciate the danger of being struck by the moving timber, of being injured by the revolving bands of steel, or by the dog roller itself, and yet did not have discretion or observation sufficient to comprehend the obvious danger of getting his foot caught between the board and the roller.

II.

Authorities Cited in Supplemental Brief of Defendant in Error.

In his supplemental brief, defendant in error cites but one case to support his original contention that an employee does not assume the dangers arising from the master's negligence when he knows of the same, viz.,

Seaboard Air Line Railway v. Horton, 233 U. S. 492, U. S. Adv. Opinions (1913), 635, 640.

While we believe it is apparent from the quotation set forth by defendant in error that the decision does not sustain his contention, an examination of the cause shows that it holds the exact contrary.

The cause came to the federal Supreme Court on writ of error to the Supreme Court of North Carolina. The plaintiff, an experienced engineer, had sued the defendant to recover damages for personal injuries resulting from an explosion which he claimed to have been caused by the absence of a guard glass in the engine. The plaintiff claimed that when the engine was delivered to him on July 27th, the guard glass was absent; that he made complaint to the foreman of the roundhouse, who requested him to continue using the engine, promising him to see that new guard glass was placed in the engine as soon as possible. The de-

fendant claimed, and its evidence tended to show, that when the engine was delivered to the plaintiff the guard glass was in the engine, in good condition, but that plaintiff had negligently allowed it to become dirty and smoky and that shortly before the accident, the fireman, in plaintiff's presence, had removed the glass to clean it, plaintiff continuing to use his engine without the glass until the explosion occurred. The statutes of North Carolina as they existed at the time of the accident, provided that when an injury was the result of a master's negligence, the servant did not assume the risk thereof. The Federal Employers' Liability Act left in full force the common law rule of assumed risk, except where the accident was due to the failure of the master to comply with a federal statute. Plaintiff and defendant, at the time of the accident, were engaged in interstate commerce. The trial court proceeded upon the theory that the state law, as to assumed risk, and not the federal liability statute governed. The Supreme Court of North Carolina having sustained the trial court, writ of error was sued out and the cause taken to the Supreme Court of the United States. The judgment was there reversed, it being held that the federal law governed and that since no federal statute required the guard glass, the common law rule of assumed risk was in effect, the court saying (the first paragraph is quoted by the defendant in error):

“But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, *unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.* These distinctions have been recognized and applied in numerous decisions of this court. (Citing authorities.)

“When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master’s breach of duty.” (P. 640.)

At the trial, the defendant requested the court to give the jury the following instruction:

“If you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then

the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.' ” (P. 640.)

It was held that it was reversible error to refuse the instruction as requested, the court saying in part:

“By the instruction as given, the application of the rule of assumed risk was confined to the single hypothesis that the jury should find the guard glass was in position when the engine was delivered to plaintiff on the morning of July 27th. This, as already pointed out, was one of the questions in dispute; plaintiff having testified that the guard glass was missing at that time, while his fireman testified (and in this was corroborated by circumstantial evidence) that it was in place at that time, and was subsequently broken. But by the common law, with respect to the assumption by the employee of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employee, and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose. Hence, if the guard glass was missing when plaintiff first took the engine, as he testified, and he, knowing of its absence and the consequent risk to himself, continued to use the water guage without giving notice of the defect to the defendant or its representatives, he assumed the risk.

“Defendant was entitled to have the requested instruction given respecting assumption of risk, and as the charge actually given did not cover the same ground, there was error.” (P. 641.)

We would be entirely willing to submit this cause upon the rules announced in the above decision of the federal Supreme Court, which is its latest expression on this subject.

Indeed, as we read the supplemental brief of the defendant in error, which was written after the oral argument of this cause, and the discussion there of the authorities cited, it seems to us that the defendant in error attempts to shift his defense of the judgment from that originally taken, viz., that the servant does not assume the risk of the master's negligence, to the contention that the case was properly submitted to the jury, because a servant who, through youth or inexperience, is unable to appreciate the danger of a known defect, does not assume the risk thereof. Many decisions on this point are cited. The rule announced by these numerous authorities is, of course, founded in reason and justice. We cannot see its application to the present case. While the ability of learned counsel has been able to cite a multitude of cases it has not produced a decision applying that rule to a case where the facts were similar to the one at bar, nor has it enabled him to point to a scintilla of evidence tending to show that the defendant in error, because of his

youth or inexperience, did not fully appreciate the danger of the dog roller or of the "X" board. He was not, as in most of the cases cited, suddenly removed from one branch of industry to be required to work in another. He was injured while at his regular employment. He was interested in mechanics and had made a study of the machinery in the mill. There was absolutely nothing about either the "X" board or the dog roller which was not known to him; there was no unusual motion of the roller which caused or produced his injury.

However, without further comment, we will notice the numerous federal and California decisions cited.

It is first suggested that the common law rule of assumed risk is inhuman and should be modified by the courts, defendant in error citing

Schlemmer v. Buffalo R. & P. R. Co., 205 U. S.
I, 11-12.

The court there, however, was dealing with a statutory modification of the rule of assumed risk. We have not, and do not propose to enter into any discussion of the merit of the law of assumed risk for the reason that unquestionably it was in existence at the time of this accident by the positive declaration of the statute. We assume that the court intends to enforce the law as it existed at the time of the accident, leaving the question of the advisability of changes for the

legislature, and that the question is not one of the advisability of the law but of the application of the law to the undisputed evidence set forth in the record.

Texas & P. R. Co. v. Harvey, 228 U. S. 319, 321-322 (cited on page 7 of the supplemental brief of defendant in error),

Arose in Texas and the statute there provided that in an action for injury or death, it should not be held that the servant assumed the risk of a master's negligence where a person in the exercise of ordinary care would have continued in the employment of the master with knowledge of the defective machinery or structures. The statute further relieved the employee from any duty of complaining of the defects of which he knew. The deceased, an assistant hostler in the roundhouse, was killed while riding on an engine, by coming in contact with posts negligently set too near the track. The Supreme Court of the United States, in pointing out the radical change wrought by the statute, said:

“At the common law a servant assumes the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty.

This rule is subject to the exception that, where a defect is known to the employee or is so patent as to be readily observed by him, he cannot continue to use the defective appliance, in the face of knowledge and without objection, without himself assuming the hazard incident to such a situation. If a defect is so plainly observable that the servant may be presumed to know its existence and he continues in the master's employment without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover."

Applying the rule announced by the above decision to the conceded facts in this case, it is evident that a verdict in favor of the defendant in error cannot be sustained.

Defendant in error invites a careful consideration of the above decision in reference to the construction to be placed on the amendment of 1907. The Texas statute is entirely different from ours, which has been twice decided by the Supreme Court of California to be a mere statutory declaration of the common law, as we have shown in our opening brief, pages 29, 47 to 55.

Railroad Co. v. Fort, 17 Wallace 553 (cited on page 10 of the supplemental brief of defendant in error),

was the case of a boy sixteen years of age who was engaged in a shop for the purpose of receiving and

putting away moldings. He had no experience whatever with machinery and was not supposed to work about it. He was ordered suddenly, by the superintendent of the shop, to leave his customary occupation and to ascend a high ladder and adjust a belt upon a machine moving at the rate of 175 to 200 revolutions per minute. It was held by the Supreme Court that the service which he was performing was outside of that which had been contracted for between the railroad and the father of the boy when he was placed to work; that it did not appear that the boy understood the nature or danger of his work, and therefore did not assume the risk.

Here the defendant in error was performing the very work which he had contracted to do. The "X" board and the roller were in the same position at the time he commenced work as they were at the time of the accident.

Gila Valley etc. Co. v. Hall, 232 U. S. 94 (U. S. Advanced Opinion 1913, 229, 231).

Plaintiff there was injured by being thrown from a handcar, owing to a defect in the flange of a wheel. The Supreme Court in holding the evidence sufficient to sustain a verdict in his favor, said:

"The motion for direction of a verdict seems to have been rested upon the additional ground that the alleged defect was so obvious that its existence must have been known to the plaintiff, and that he therefore assumed the risk. There was no direct evidence that he knew of the defect, and it does not appear to have

been a part of his duties to inspect the machine or the wheel, or to look after their condition. He had been employed for only three or four days in work that required him to ride upon the car, and at the utmost it was a question for the jury whether the defective condition of the wheel was so patent that he should be presumed to have known of it. * * *

“An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer’s negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer’s negligence, *until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it.*”

Smith v. Cook, 164 Fed. 268, 187 Fed. 538, 540
(cited in the supplemental brief of defendant
in error on page 10),

is merely a discussion of conflicting evidence as to how an accident occurred.

Defendant in error, on page 10 of his supplemental brief, cites a number of California decisions to support the well recognized rule that an employee who is so lacking in age or experience as not to be able to appreciate the danger incident to known defects, does

not assume the risk thereof. As heretofore pointed out this rule has no application to the case at bar.

Foley v. Cal. Horseshoe Co., 115 Cal. 184, 194, was a case of a boy fourteen years of age injured by reason of a defective belt. He had called the attention of the foreman to this defective belt and the foreman had assured him that there was no danger and told him that the belt was all right, and that it could not cause any harm to him. Little argument, we believe, is necessary to demonstrate the difference between that case and the one we are considering. Here the plaintiff, seventeen years of age, man grown, and doing a man's work, was injured by an open and obvious piece of machinery, the danger of which was perfectly apparent to him. He made no complaint of it, and was not assured by anyone that it was safe. It was conceded at the oral argument that he had sufficient appreciation to assume the risk of injury from having his foot struck by the roller. Surely he must have known that if the roller would injure his foot if it struck it, that his foot also would be injured if caught and held against the roller.

Pigeon v. Fuller, 156 Cal. 691, 697 (cited on page 16 of the supplemental brief of defendant in error).

Plaintiff in a lead factory was injured by the escaping fumes from melted lead. He knew of the escaping fumes, but did not know that they were poisonous.

Quinn v. Electric Laundry Co., 155 Cal. 500.

A girl, with no knowledge of or experience with machinery, was set to feeding sheets through a mangle. The guard to the mangle was defective and one of the rolls which contributed largely to her injury was concealed from her view. All of the witnesses in the case agreed that it required an expert to handle pieces as large as sheets, which must be fed in a certain special way, that if they were not fed in that way, the hand of an operator was likely to be drawn into the machine. It was admitted that plaintiff had received no instructions whatever as to how to feed these sheets to the mangle.

Petersen v. Cal. C. Mills Co., 20 Cal. App. 751.

Defendant in error requests that this case be considered with special care, and seems to place great weight upon the fact that a rehearing was denied by the Supreme Court of this state. The Supreme Court, however, has expressly declared that the denial of a rehearing of a cause decided by the Court of Appeal does not imply that the Supreme Court approves the law as announced by the appellate court.

See:

People v. Davis, 147 Cal. 346, 350;

Estate of Campbell, 12 Cal. App. 707, 724.

If this decision attempted to announce a rule different from that promulgated by the Supreme Court of the state or the federal courts, we assume it would not be followed. However, it does not do so. There

the plaintiff, a minor, without knowledge of or experience with machinery, was taken from his regular work and ordered to mount a ladder which leaned almost perpendicularly against a beam; there were no hooks or braces to hold it, but it did not appear that such fact was known to the boy; the ladder had been placed in position by his foreman only a moment before, he was directed to go upon it. The ladder slipping, he was precipitated against a fast revolving belt and injured. It was held that the question of his assumed risk was for the jury, the court saying, in addition to the quotation printed by defendant in error:

“These circumstances, briefly stated, are the complexity of the situation, the fact that plaintiff was a minor and presumably without the judgment of an adult, that he was ordered by his superior to do the work which was outside of and more hazardous than his usual employment, that he was expected to and did obey promptly and that he had a right to assume that the ladder was placed with due regard for his safety. In view of these incidents, we think it cannot be said as a matter of law that no other rational inference can be drawn than that plaintiff was guilty of contributory negligence.” (Pp. 756-757.)

It seems to us that little argument is necessary to point out the distinction between that case and the one at bar. Here the plaintiff was not taken from his regular employment. While at the time of the accident, he had to work fast, he was not suddenly confronted with a danger seen for the first time. Ever since the push and carrying tables had been constructed, he had known

the purpose of the dog roller; known that it was revolving at a high speed and knew the "X" board was within an inch or two of the roller and that if his foot was caught between them it would be hurt. His injury was not due to any failure to appreciate the danger of getting his foot caught between the board and the roller, but solely in failing to carry out his intention to step clear of both of them.

Mansfield v. Eagle Box etc. Co., 136 Cal. 622.

Plaintiff, nineteen years of age, was injured by having his hand drawn against a buzz saw while he was sawing wood. He was unacquainted with machinery and had never worked about a buzz saw except one of an entirely different pattern for ten or fifteen minutes a day for four or five days. At the time of his injury he was pushing a board on the table under the saw, which was revolving downward. It was shown by the testimony that there were other ways in which the work should have been done, but he had received no instructions how to perform his work. It does not appear from the opinion what caused his hand to come in contact with the saw. The defense of assumed risk apparently was not raised, urged or decided, it merely being held that the question of negligence of the defendant, and of contributory negligence of the plaintiff should have been left to the jury.

Merrifield v. Maryland Mfg. Co., 143 Cal. 54;
Schellin v. No. Alaska Salmon Co., 167 Cal.

103,

were cited in the original brief and have been commented on.

Daubert v. Western Meat Co., 135 Cal. 144
(cited on page 10 of supplemental brief of defendant in error).

Plaintiff was working in a factory and was taken from his ordinary vocation and required to place a belt on overhead machinery, while the same was in rapid motion. He was killed while attempting to carry out these instructions by reason of set screws in a revolving shaft. It was claimed by the defendant that plaintiff assumed the risk of these set screws because he knew of them. The Supreme Court held, however, that the evidence did not show without dispute, that he knew of the set screws, saying:

“Here the work which deceased was doing at the time of his death was outside of and different from his regular work. This being so, if he did not know the character of the machinery and the danger surrounding the act of removing the belt, then he assumed no risk in attempting to carry out the orders of the foreman. There is some vague general evidence, upon the part of the foreman, that deceased knew of the situation of these set screws. This evidence in no sense is positive and direct to that effect. It is based upon inference and presumption; and in a case involving the principle here declared, it will not be held, as matter of law, that the injured party assumed the risk unless the evidence is clear, explicit, and uncontradicted to that point. * * * (P. 147.) His ordinary duties were performed some distance from the shaft, and had no connection whatever with it. The shaft was overhead, and therefore out of the ordinary

line of vision. It was in constant revolution during working hours, and, when revolving, the set screws could not be seen. While it is in evidence that deceased, under orders, requested the engineer at one time to fix the set screws, it is not at all apparent that he saw them at that time. It is also in evidence that set screws are ordinarily made flush with the coupling, thereby not protruding, and it does not follow that in conveying the order to the engineer he necessarily knew either the locality of the set screws or that they protruded." (P. 148.)

In the case at bar the evidence is clear, explicit and uncontradicted that the defendant in error knew of the roller, knew it was shod with sharp spikes, and also knew of the "X" board and its proximity to the roller. As to these facts there is no dispute; no room for different men to draw different conclusions, for the plaintiff many times testified to their existence. In fact, we have based all of our arguments upon the testimony of the defendant in error alone.

Jensen v. Will Finck Co., 150 Cal. 398.

Plaintiff, a boy of twelve and a half years of age, was employed as a cash boy in a department store. On the day of the accident he was sent to work in defendant's store room, his duty there being to push heavy trucks onto an elevator and then ride on the elevator to the top of the sidewalk and push the trucks down Farrell street to defendant's new store house. The side wheels of the truck were larger than the other wheels, so that the truck, when stationary, would tilt

to one end. It also had a tendency to move forward when at rest. On the first day of plaintiff's employment, after he had moved several truckloads in the manner described, he, and another small boy, undertook to move an especially heavy truck, the plaintiff pulling it and the other boy pushing it, upon the elevator. There were no sides to the elevator and when the truck was placed on it there were only a few inches between the sidewalk and where the plaintiff had to stand. After the elevator had been started upward, the truck moved forward slightly and forced the plaintiff's leg against the sidewalk, crushing it so that amputation was necessary. On cross-examination the plaintiff said that he was old enough to know and understand that if he got his foot beyond the elevator it would be hurt. The Supreme Court held that this was not sufficient to show that a boy of twelve and a half years of age appreciated the additional danger of the truck moving forward and thus injuring him, saying in part:

"This evidence, however, only proves that he knew if he projected his foot beyond the elevator he would get injured. It was not evidence that he knew and appreciated the fact that the truck he was taking up in the elevator might by reason of its size and construction or its position on the elevator list to the side and push his foot beyond the elevator floor. * * *

It was one thing for him to have known that the truck would shift, but another thing to have sufficient judgment to apprehend any dangers from it. If from youth or inexperience, or both combined, he did not

appreciate the peril in which such shifting might place him, he is not deemed in law to have assumed the risk of injury so as to relieve the defendant from any liability in placing him there without warning. * * * (P. 407.)

"It is true that where a minor is shown to have known of the special dangers attending work to which he has been assigned, and has sufficient intelligence and judgment to appreciate them, the employer will not be held liable for any injury sustained by him during such work resulting from dangers which he knew and appreciated. Under such circumstances, as in the case of an adult, he will be held to have assumed the risk of injury." (P. 408.)

We submit that the evidence here unquestionably shows that the defendant in error did understand and appreciate the dangers of his position. There was nothing concealed or latent about it. There was no unusual motion of the machinery which caused his injury. There is not a scintilla of evidence to show that through youth or inexperience, the defendant in error did not fully appreciate and understand the very obvious danger of getting his foot between the board and the roller.

In connection with the rule announced in *Jensen v. Will Fink Company*, we again print the language of the Supreme Court of California in

Bresette v. E. B. & A. L. Stone Co., 162 Cal.
74, 79.

“In view of what has been shown as to the obviousness of the danger, it is also clear that the defendant was not guilty of negligence productive of injury in failing to instruct plaintiff as to such danger. There was nothing to tell him in this regard that he did not already know or must be presumed to have known. In this connection, the language of the Supreme Court of Massachusetts in *Wilson v. Mass. Cotton Mills*, 169 Mass. 67 (47 N. E. 506), is pertinent. The court said: ‘The plaintiff’s contention is that he was set to work on a dangerous machine without proper instructions. But it is difficult to see what the defendant’s officers could have told him that he did not already know. It was apparent that the wheels were uncovered. They were certainly not bound to tell him that if he got his hand in the cogs he would be hurt. *This any child of ten would know.*’”

It was strenuously insisted at the oral argument and again reiterated in the supplemental brief, that plaintiff in error should have warned defendant in error of the danger of getting his foot caught between the roller and the “X” board, but as remarked from the bench at the time of the oral argument, there was nothing which the employer could have told defendant in error that his own eyes did not tell him. The language of the Supreme Court in the *Bresette* case is peculiarly appropriate.

Again, as we have often remarked, the misfortune of the defendant in error was not through failing to appreciate the danger of getting his foot between the roller and the board, but was caused entirely by his

failure to execute his intention of stepping over both the board and the roller. If he had been warned a hundred times of the danger, such warning would not have prevented his misstep.

Because of the length to which this brief has been extended, we do not believe it necessary to comment in detail on the numerous decisions cited from the courts of sister states. We have examined all of them, and all are plainly distinguishable from the case at bar. In most of them the evidence does not show, without dispute, that the plaintiff knew of the defect which produced his injury. In the few cases cited where the defect was known, the danger incident thereto either was not known and was not obvious.

Tuckett v. American Steam etc. Laundry, 84
Pac. (Utah) 500 (cited on page 11 of the
supplemental brief of defendant in error),

is illustrative of the rest, and as it is one of the strongest in favor of defendant in error we will notice it.

Plaintiff was injured while working about a mangle. She had worked about mangles of different patterns for a number of months, but had no special knowledge of or experience with machinery. She observed that a certain board that ran through the mangle did so with a jerky motion, and was not returned automatically as quickly as it should have been. She called this to the attention of the superintendent, who assured her there was nothing the matter with the machine, that it would adjust itself in a little while, and that, until it did so, to keep her hand upon the board,

thus steadying it. While she was doing the work as directed, the board started forward suddenly, and more rapidly than usual, and thus drew her hand into the rolls. It was held that it could not be said, as a matter of law, that she assumed the risk of this injury; that it did not clearly appear that she had sufficient knowledge of machinery to appreciate the fact that the jerky motion of the machine would indicate that it would suddenly and unexpectedly start in an unusual manner. The rule of law stated in *Railroad v. McDade*, *supra*, was adopted, viz., that a servant does not assume risks of defects unless he knows of them and appreciates the danger incident thereto; that where a defect is either known to a servant or open and obvious, he assumes the risk if he continues to work with it, without making complaint. The Utah court pointed out that these rules are recognized by all authorities, the only dispute being as to their application to each case, saying (at pages 506 and 507):

“As has already been said, however, the applicability of the principle depends on the precise circumstances of each case. An attempt, even if possible, therefore, to distinguish all those cases from that at bar, would be unprofitable. But inasmuch as counsel rely particularly upon the case of *Kupkofski v. Spiegel* (Mich.), 97 N. W. 48, and inasmuch as the facts in that case are more similar to those in the case at bar than most of the cases cited by counsel, we deem it right to consider that case somewhat in detail and by way of comparison. In that case plaintiff sued to recover damages for personal injuries received by her

while operating a shirt-bosom ironer in defendant's laundry. The ground of negligence relied on was that the defendant allowed the machine, which was apparently the same as that in question here, to become out of repair. The testimony introduced on behalf of the plaintiff showed that she was 17 years old, and had worked at the machine about two weeks, when the belt which furnished the power to the machine became loose and caused it to run with a jerky motion. With the machine running in this fashion, and while the plaintiff was holding the shirt on the ironing table or board, about six inches away from the roller, the table or board stopped and then started with a jerk, drawing plaintiff's hand under the roller. The trial court directed a verdict for the defendant, and on appeal the judgment was affirmed on the ground that the plaintiff assumed the risk, and was also guilty of contributory negligence. It will be noticed at once that, so far as the question of assumed risk is concerned, there is an all-important difference between the facts in the Michigan case and in the case at bar. In the former case the plaintiff observed the precise defect that caused the injury. She knew that the belt was loose, and that, when the friction became unusual, the machine would slow down, and, as the belt moved again to perform its office, the machine would start up again, so that she knew exactly what to expect when the machine stopped. On the contrary, in the case at bar the plaintiff only knew that the machine ran in a jerky, unsteady fashion. There was no defect apparent to her, like a loose belt, which indicated in any

manner that the machine would, at any time, run faster than ever before. In the former case the court could well say that the plaintiff should have realized the danger, that she was not ignorant of it, whereas in the present case it is impossible for the court to so say."

Assume that, as the defendant in error was stepping over the dog roller he had been injured, not by his foot slipping between it and the "X" board, but by the dog roller jumping a few inches from its bearings; that this unusual motion of the roller had been due to the looseness or absence of some bolt; that the defendant in error had known of the absence of the bolt but had not known that the absence or looseness of the bolt would allow the roller to jump from it bearings. In such case it could not be held that he assumed the risk of his injury, although he knew of the defect. But he was not so injured. His misfortune was not caused by any unusual motion of the machine, but by getting his foot accidentally caught between the board and the roller. Any child of ten would know that such an accident would have produced serious injury.

Defendant in error repeats the argument advanced in his original brief, that the amendment of 1970 worked some change in the common law rule of assumed risk. As before noted, by citations on page 29 of our opening brief, the Supreme Court of California has twice held to the contrary. A reading of the cases cited by us on page 29 of our brief, of the decisions rendered prior to the amendment, show that the law always has been construed by the Supreme Court of this state exactly as it was declared by the amendment.

In addition to these decisions,

Schellin v. North Alaska Salmon Co., 167 Cal.
103 (cited by defendant in error on page ...
of his brief, and page 10 of his supplemental
brief),

applied the same rule to a case arising subsequent to 1907, as had been in force prior thereto.

The amendment of 1907 did not primarily deal with the assumption of risk or of contributory negligence, but was intended to modify the defense of negligence of a fellow-servant by incorporating thereon what is known as the department rule. But whether we are correct in our construction of this statute or not, the statute by clear and explicit terms imposed upon the servant the assumption of risk arising from defective places of work where the servant knew of the defect and fully appreciated the danger incident thereto.

While the statute required an employee to have full knowledge and comprehension of the danger, it cannot be assumed that it was ever intended that he should escape the assumption of risk by wilfully refusing to see that which was plainly visible to him. Indeed, counsel, on page 3 of the supplemental brief of defendant in error, state:

“We do not mean to say that such actual understanding, comprehension and appreciation may not in exceptional and extreme cases appear to an appellate court to be so clear and positive upon the whole evidence, notwithstanding even the denial of the plaintiff that it will hold that the court below and not the jury should have decided that question of fact. This is

what we understand is meant by the phrase that in such a case it becomes a question of law.”

If the present case does not present such an exceptional case and one free from doubt, we are unable to comprehend how such a case could be presented. The defendant in error, man grown, and doing a man’s work, a student of machinery, was injured by getting his foot caught between the board and the roller. He was fully aware of the existence of both.

We again take the liberty of calling the court’s attention to the testimony of defendant in error, set out more fully on pages 42 and 43 of our opening brief:

“I knew that roller was revolving. As near as I can remember, the roller made about a hundred revolutions a minute. * * *

“I suppose I knew it. Most likely I knew if I got my foot in there it would be injured. I don’t see how you can expect me to state that I knew if I got my foot in there I would be badly injured, at least would be injured, when I never gave it a thought at the time. I suppose I ought to know it if that is what you mean. I knew the board X in the model was there. I never attempted to put my foot on that board by stepping on the carrying table on the board and then over.” [Trans. pp. 150-151.]

“Q. You appreciated if you put your hand in that revolving dog roller, it would get torn and get hurt, did you not? A. I never gave any thought to that either. If I had thought, most likely I would have known it. I never had any occasion to think of it.” [Trans. pp. 156-157.]

If the plaintiff had scalded his hand by placing it in water which he knew to be boiling, or had burned it by coming in contact with fire, the existence of which he knew, could he escape the assumption of risk by stating that he did not stop to think that boiling water would scald, or fire burn? Obviously not.

It is apparent from defendant in error's own testimony that, even if the "X" board had not been present, his foot would have come in contact with the roller and been injured.

"I was in the act of stepping over there and the next thing I knew my foot was caught (by the roller) and pulled in between the roller and the board and the roller coming down chewed up my foot." [Trans. of Rec., page 148.] "I can't say whether my foot caught in there as I went up or whether I stepped clear up and my foot slipped back in again." [Trans. of Rec., page 149.]

Injury must have resulted regardless of the existence of the "X" board, but no one can determine its extent. The risk of such injury, whatever it might have been, counsel for defendant in error admits was assumed.

It is perfectly apparent that if the defendant in error did not fully appreciate the danger incident to stepping over the roller, such lack of appreciation was due entirely to his failure to give any care, attention or thought to dangers which stared him in the face. If such is the case he exposed himself to a danger, without understanding it, as a result of his own lack of care and attention, and is therefore convicted of con-

tributory negligence. We have urged this in our opening brief and have received no reply and can conceive of none.

We feel that possibly these supplemental briefs, instead of aiding the court, have added to its labors. After all, the numerous decisions cited by both parties announce but one rule, viz., that where it is a debatable proposition either that the injured servant knew of the defects or that if he knew of them that he appreciated the dangers incident thereto, then it is the province of the jury, the triers of fact, to determine such debatable question. If, on the other hand, it is not debatable, and it clearly appears without dispute that the defect and dangers incident thereto were known to the servant, or so open and obvious that if he exercised ordinary care in doing his work he must have known and appreciated them, then, as a matter of law he is held to have assumed the risk of his injury, and there is no question to be submitted to the jury. No decision cited by either party announces any different rule. It is then, after all, a question of the application of these settled and undisputed rules to the facts embodied in this record. We believe that those facts show beyond cavil that the position of the roller and the "X" board were known to the defendant in error and that the danger of getting any part of his person between them was obvious and was fully apparent to, and appreciated by him. That being so, the statute in force at the time of the accident forbids a recovery.

The question of the contributory negligence of the defendant in error and also the questions presented by the instructions given and refused, we submit on the argument already made and the briefs on file.

Respectfully submitted,

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No. 2410

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BENSON LUMBER COMPANY, a corporation,

Plaintiff in Error,

vs.

H. C. McCANN, by Jesse F. McCann,
his guardian ad litem,

Defendant in Error.

Supplemental Brief for Defendant in Error

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Filed

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F. D. Moulton,

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Supplemental Brief for Defendant in Error

I.

In the brief to which this is by the gracious permission of the court permitted to be a supplement, we adverted to what we ventured to characterize as the primary sense in which the term assumption of risk is used when the master is not charged with negligence, as distinguished from the secondary sense in which the term is used when the negligence of the master supervenes. This distinction is most clearly stated by the Supreme Court in the very recent case of *Seaboard Air Line Railway vs. Horton* (April 27, 1914) 233 U. S., 492, U. S. Adv. Opinions, 1913, 635, 640, as follows:

“Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort,

whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court." Citing 191 U. S., 64, 68; 220 U. S., 590, 596; 228 U. S., 319, 321; 232 U. S., 94, 102, and cases in them cited.

We have submitted with sufficient fullness that because the plaintiff received his hurt from a proximate cause negligently created by defendant outside of any function of this lumber mill, the doctrine of contractual assumption of risk in the primary sense as incident to the employment has no application whatever.

In this connection we note the suggestion made in argument that the X board had a utility to prevent the clothing of employees working about the dog-roller from being caught by it. The sole foundation for this is what was said in the testimony of plaintiff (Tr., p. 159) to the effect that "I was informed afterwards that it was there for the purpose of avoiding getting your clothes caught in the teeth of that roller when you got up on the platform, but I never knew it at the time." This "information" was evidently by way of excuse made to him after his injury for the presence of this plank. How lame an excuse, is apparent when it is remembered that the dog-roller rose and was exposed *above and in immediate proximity to the X board*, and that the presence of that *in its combination*

with the roller, is what made the chief element of danger from any clothing, whether from coat or shirt sleeve to shoe, being caught by the roller. This is demonstrated by what actually occurred.

We submit that there is no ground, as a matter of law, under the evidence, of any justification for this X board, by any possible function which it served in the work of the mill. (Kilty, Tr., p. 200; Diller, Tr., p. 175; Coffin, Tr., p. 225.) Therefore, because of this and the concurring negligence of defendant, there was no assumption of the risk in the primary sense of the term.

II.

We have submitted in the former brief that by the amendment to Section 1970 of the Civil Code, the doctrine of assumption of the risk of injury in the secondary sense in case, where the risk arises from the master's negligence, is confined to *actual* as distinguished from *imputed* or *constructive* understanding, comprehension and appreciation of the danger incident to the use of defective machinery, ways, appliances or structures.

We do not mean to say that such *actual* understanding, comprehension and appreciation may not in exceptional and extreme cases appear to an Appellate Court to be so clear and positive upon the whole evidence, notwithstanding even the denial of the plaintiff that it will hold that the court below and not the jury should have decided that question of fact. This is what we understand is meant by the phrase that in such a case it becomes a question of law. But what we do mean to insist upon, is that this statute does away, both for court and jury, with such inquiries as to what in respect of danger from the negligent act of the master the injured employee *ought* or *should* have understood, comprehended and appreciated; and it

limits the inquiry to what he did in *fact* understand, comprehend and appreciate.

We submit that when the whole evidence in this case is read and all the circumstances considered, the conviction will ensue that this youth had not the first suspicion of the particular danger which caused his hurt. That when it is argued for the defendant that he *ought* to have understood, comprehended and appreciated this particular danger; or that by the exercise of reasonable care he *would* have understood, comprehended and appreciated it, it is argued that the statute be disregarded. We submit that the elaborate amendment of March 6, 1907, must have some purpose other than to simply declare the law as it theretofore existed on this subject. And we submit that one plain purpose of the amendment was to do away with all speculation as to whether the injured employee should, or ought to have understood, comprehended and appreciated the danger; and that the amendment brings the inquiry down to the naked question of fact in this case, whether indeed and in truth "such employee fully understood, comprehended and appreciated the danger" lurking in the relation between the X plank and dog-roller, which he encountered in obeying the order and requirement to mount the "push table" in the manner in which he did mount it.

We submit that when, as applied to this case, the statute makes void any implied agreement to *waive* the benefit of the amended section or any part thereof, it in effect commands that the secondary doctrine of implied assumption shall be limited to cases of *actual*, and prohibits it from being extended to mere *constructive* or *imputed* understanding, comprehension and appreciation of the danger from such risk.

We submit also, that that statute in its declaration that

"this section shall not be construed to deprive any employee or his legal representatives of any right or remedy to which he is now entitled under the laws of this state," leaves to this minor plaintiff in all courts the rights and remedies guaranteed to him under the settled law of this state, as reaffirmed in the numerous decisions cited in the brief to which this is a supplement at pages 50-51, and declared by the District Court in its instruction No. VIII (Tr., p. 270).

That is to say, before this youth can be held as a matter of law to have assumed the risk of the defendant's negligence, it must appear that the master first gave him such full and complete instruction as to enable him to comprehend the dangers to be encountered, without which it was a "breach of duty for the master to expose such servant, *even with his own consent to such danger.*"

(See the cases cited pp. 50-51 of our original brief.)

That statute, we submit, has given legislative sanction to the modern tendency to regard as for the jury the question of assumption in this secondary sense of the risk arising from the master's negligence. More specifically, the statute in requiring that the acquiescence in, or condonation of, the master's negligence and waiver of his responsibility by the employee, shall be predicated, only when it appears as a fact that he "fully understood, comprehended and appreciated the dangers" consequent thereon, renders the determination of this fact peculiarly a question for a jury. We have it upon authority that modern decisions have receded both in England and the United States, more and more from the doctrine of this secondary assumption of risk enforced by the court, as a matter of law, in the "inhuman" form in which it was expounded by Lord Bramwell in *Dynen vs. Leach* (1857) 26 L. J. Exch. N. S., 221.

See Labatt, Master & Servant, 2nd Ed., Sec. 960.

Schlemmer vs. Buffalo R. & P. R. Co., 205 U. S. 1, 11-12, per Holmes, J.

In *Rase vs. Minncapolis, St. P. etc., R. Co.* (Minn., 1909), 170 Minn., 260, 120 N. W., 360, 21 L. R. A. (N. S.), 138, 152, it is said:

"The statement is currently made that the American cases, taken as a whole, are inclined to regard the questions involved in assumption of risk—knowledge of dangerous conditions, appreciation of risk, and acquiescence therein—as for the jury. In connection with this opinion many hundreds of cases have been examined and that tendency verified."

That case contains an elaborate review of the English and American course of decision upon the subject of submission to the jury in such cases of the question of plaintiff's assumption of the risk caused by the employer's negligence. In the course of the opinion, it is said (21 L. R. A. (N. S.), p. 152) referring to *Washington & G. R. Co. vs. McDade*, 135 U. S., 554, 572:

"After stating the current formula as to contributory negligence and assumption of risk, Lamar, J., said, quoting from *Jones vs. East Tennessee etc., R. Co.*, 128 U. S., 443, 445-6; 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.'"

In the McDade case, there was also quoted (135 U. S., 572) from the Jones case (128 U. S., p. 446) the language, to-wit:

"... a due regard for the respective functions of the court and the jury would seem to demand that those questions should have been submitted to the jury."

See also on the question whether the learned District Court properly submitted this case to the jury;

Texas & P. R. Co. vs. Harvey, 228 U. S., 319, in which a statute of Texas which qualified the rule of assumed risk caused by the master's negligence was considered. The case has a decided bearing upon the effect of the amendment of Civil Code, Section 1970, upon the secondary doctrine of assumed risk in this state.

And since by this statute under the defense of confession and avoidance, the very point of inquiry is *as to the fact* whether the plaintiff "fully understood, comprehended and appreciated the risk and *thereafter* consented to continue in the work, there is entirely appropriate to be applied here what, the court said in *Texas & P. R. Co. vs. Harvey*, *supra* (228 U. S., p. 325):

"The appellate court is not a jury for the trial of a case nor do we have the powers of a court to grant a new trial, which, in the Federal practice, is a matter vesting in the sound discretion of the trial court."

As was said in the oral argument by counsel for the plaintiff in error, a motion for new trial was made before the District Court and denied. The case has consequently passed that ordeal.

The question before this tribunal therefore comes to this. Did the alleged assumption of the risk which was caused by defendants' negligence become under all the evidence and circumstances so imperatively a question of law that the appellate court will now say that the court below erred in that it did not take the case from the jury, by directing a verdict for the defendant and in not setting aside the verdict for plaintiff?

Texas & P. R. Co. vs. Harvey, *supra*, 228 U. S., 324, 325.

In *Chicago Screw Co. vs. Weiss*, 203 Ill., 536, 68 N. E., 54, 55, the rule is laid down in terms substantially identical with that declared in *Gardner vs. Michigan C. R. Co.*, 150 U. S., 349, 361, cited on page 53 of our original brief as follows:

“Whether a servant had assumed the danger which he encountered is ordinarily a question of fact and only becomes a question of law when but one conclusion can be drawn from the evidence by all reasonable minds.”

We submit that in this case the conclusion of the court below in the submission of the case and in the review of that submission on motion for a new trial should have its proper consideration.

As bearing upon the contention upon which the writ of error in this case is principally rested, to-wit, that the danger in encountering which plaintiff was injured, was so obvious that it was error for the District Court not to have held, as a matter of law, that plaintiff assumed the risk and that the action is barred, we seek to summarize the principal elements of the case as developed in the evidence, with a citation from the vast body of precedents of a few deemed apposite to one or more such elements, as follows:

1. The master ordered and required the plaintiff, in addition to and beyond the work for which he was employed and for which his wage was fixed, which work was in itself exceedingly strenuous even for a mature workman, to perform the extraordinary service of mounting the push-table to clear the jams of lumber.

2. Plaintiff was a minor aged 17 year and inexperienced.

3. This extraordinary work was of an extra hazardous nature and was required to be performed while the

mill was in operation, and in order to prevent interruption of its operation by relieving and supplementing the defective working of its machinery, and under conditions of extreme haste, noise and confusion.

4. The defendant furnished no proper appliances for mounting the push-table.

5. The defendant gave to plaintiff no instruction how to mount or warning respecting any danger to be encountered in mounting the push-table to perform such extraordinary work.

6. The proximate cause of the injury was the useless X board which combined with the dog-roller to create a latent danger outside of any function of the mill or any work for which the plaintiff was employed.

7. Nothing had occurred to direct plaintiff's attention to this particular danger and he did not at all understand, comprehend or appreciate the danger extraneous to any function of the mill, caused by this X board.

In view of the concurrence of all these elements, it is submitted that the District Court properly submitted the question of assumption of risk to the jury; that it properly exercised its discretion to deny the motion for a new trial; and that in the exercise by this court of its appellate powers it is open to it to say, in the language of the Supreme Court of the United States in the case of *Texas & P. R. Co. vs. Harvey*, *supra*, 228 U. S., 319, 325:

"Under all the circumstances, as we have related them, we cannot see, as an appellate court, that the court was wrong in leaving the question to the jury under the fair and full instructions given."

As applying to one or more of the concurring elements above stated which tend to make the issue of assumption of risk in the secondary sense, owing to the conceded neg-

ligence of defendant, a matter for submission to the jury, rather than a matter of law for the court, we cite the following authorities; but we premise the remark that all such citations are subject to consideration of the amendment to section 1970 of the Civil Code, which, we have submitted, excludes any doctrine that the full understanding, comprehension and appreciation of the incident dangers, as required by the statute, is to be established by construction or imputation rather than by the determination of the fact itself.

The following cases, we submit, apply to one or more of the elements which inhere in this case, as above stated:

Union P. R. Co. vs. Fort, 17 Wall., 553, 557-8;

Smith vs. Cook, 164 Fed., 628, 630-1, affirmed in 187 Fed., 538, 540;

Gila Valley G. N. Co. vs. Hall, 232 U. S., 94.

"As in all cases of extraordinary risks, the question of whether the servant appreciated the risks of new duties, is primarily for the jury."

Labatt Master & Servant, 2nd Ed., Sec. 1386, p 3990, citing *Foley vs. Cal. Horseshoe Co.*, 115 Cal., 184, 194.

See also *Daubert vs. Western Meat Co.*, 135 Cal., 144, 147-149;

Mansfield vs. Eagle Box etc., Co., 136 Cal., 622, 625-6;

Merrifeld vs. Maryland Mfg. Co., 143 Cal., 54;

Jensen vs. Will Finck Co., 150 Cal., 398, 411;

Quinn vs. Electric Laundry Co., 155 Cal., 500, 507;

Schellin vs. North Alaska Salmon Co., 167 Cal., 103;

Petersen vs. Cal. C. Mills Co., 20 Cal. App., 751, 757, 758, 764;

Wells & French Co. vs. Capaczynski, 218 Ill., 149, 75 N. E., 751.

In *McMahon vs. McHale* (Mass.), 54 N. E., 854, 855-6, it was said:

"As neither of the men injured was concerned with the derrick except that it was so near the place where they were at work that it might injure them if it should fall, we think it cannot be said as a matter of law, that they were negligent in working there, or that they had accepted the risk of injury."

This has a bearing upon the unnecessary X board in this case.

Shannon vs. Shaw, 201 Mass., 303, 87 N. E., 748;
Tuckett vs. American Steam & Hand Laundry, 30 Utah, 273, 84 Pac., 500;

Noden vs. Verlender Bros., Inc., 211 Pa. St., 135, 3 A. & E. Ann Cas, 367 and note.

Dallmand vs. Saalfeldt (Illinois), 175 Ill., 310, 51 N. E., 645.

In *St. Louis Cordage Co. vs. Miller*, 126 Fed., 495, much relied on by defendant, but plainly distinguishable from the case before the court, it was said (p. 509):

"Of course, the question whether or not a servant has willingly assumed a risk of the service is, like all questions of fact, for the jury when the evidence is conflicting or when the deductions from it are doubtful, and as this is usually the case in the trial of this issue, as in the trial of all other issues of fact, the general rule becomes that this question is ordinarily for the jury."

In the course of the oral argument, a question was put to counsel from the bench in substance, as to what warning or caution the employer in this case could have given that would have been of any utility to the plaintiff?

With great deference we may be permitted to observe that the only complete answer to this question would have been, had the evidence not established the direct contrary, precisely what the amended answer of the defendant alleged in many forms (Paragraphs IV, V, VI, Tr. pp. 69-77) to-wit: that defendant warned and instructed and ordered the plaintiff *not* to go on said push-table at all.

That pleading is instinct with the consciousness that the only real defense of which this case could admit, was that the master did not expose this youth at all to the danger of mounting this push-table and especially not in the manner in which he was required to do when he was injured.

But this defense absolutely broke down and not the least under the testimony of the defendant's foreman himself. He testified (Tr., p. 192):

"There would be *no occasion* for him to get up there *when it* (the mill) *was not running*. The only occasion there was for getting on that push-table *was when the mill was running*."

And see the succeeding testimony, Tr., pp. 193, 196, 201, referred to in former brief, pp. 15-16, 17-19.

We submit, in answer to the argument that this boy was expected to stop the mill whenever a jam occurred, that to prevent that self-same thing and to keep the continuous processes of the mill in motion and without interruption was the very object and purpose for which plaintiff was required repeatedly to expose his life and limb; moreover there is no evidence that any provision was made by which plaintiff could stop the rollers in the push-table; and the burden of such a defense rested on defendant.

Upon this particular branch of the case we beg to cite

what was said by the court in *Kuphal vs. Western Mountain Flouring Co.*, 43 Mont., 18, 114, Pac., 122, 125. It was there said, concerning a boy of 17, put to work at a rip-saw, that the work "was so dangerous that the boy ought not to have been allowed to use it at all."

This case by reason of the extraneous and as we submit latent risk caused by the master's negligence, and the other elements above referred to is vastly stronger for the plaintiff than that. For we submit that this case discloses a series of compulsory exposures of this youth to risks to the like of which no slave holder with any sense of the value of his human chattel would not have thought of exposing him.

But since this defense broke down, the defendant seeks refuge in confession and avoidance, which is predicated upon the premise that plaintiff was required to mount this push-table just as he attempted to do when he was hurt.

In that point of view, we respectfully submit that, especially in the case of an immature employee, who may, as is characteristic of youth, be thoughtless or inconsiderate of danger, especially when ordered to incur it, due warning still has its function. It is said under section 4055, volume 8 of Thompson Negligence (White's Supplement, 1914):

"The reason for warning the servant is either to impart to him knowledge that he does not possess or to impress upon him the necessity of bearing in mind the danger."

In support of which it cites:

Belincse vs. Platt, 84 Conn., 632, 81 Atl., 339;

Kuphal vs. Western Mountain Flooring Co., 43 Mont., 18, 114 Pac., 122.

We invite particular attention to the case of *Petersen*

vs. *California C. Mills Co.*, 20 Cal. App., 751. In that case a petition for rehearing in the appellate court was denied by it, and a petition thereafter to have the case heard in the Supreme Court was denied by that court, and the case as the opinion shows was thoroughly considered.

We submit that that case is a strong authority against the contention that this case was improperly submitted to the jury. Much of what is there said has cogent application to the circumstances of this case. There, as here, a minor of 17 years of age was ordered to do a perilous task outside of his ordinary employment in a dangerous surrounding, without warning and under circumstances which established the master's negligence. See, *ibid*, pp. 756-760.

We submit that what is so much relied upon by defendant here in the cross-examination of the plaintiff six years after the injury, and after the plaintiff had fitted himself to describe the mill by a course of study in mechanical drawing, is well answered in the following extract from the opinion, *ibid*, pp. 756-757, to-wit:

"The Socratic method of the examination was admirable and it revealed an intelligent and candid witness, but the conclusion that his answers required the withdrawal of the question of negligence from the jury is opposed to the principle enunciated in well-considered cases and is the result of a failure to give due prominence to certain significant features of the occasion. These circumstances, briefly stated, are the complexity of the situation, the fact that plaintiff was a minor and presumably without the judgment of an adult, that he was ordered by his superior to do the work which was outside of and more hazardous than his usual employment, that he was expected to and did obey promptly and that he had a right to assume that the ladder was placed with due regard

for his safety. In view of these incidents we think it cannot be said as a matter of law that no other rational inference can be drawn than that plaintiff was guilty of contributory negligence."

And we submit that this case, as the court held in that (*ibid*, p. 760)

"Presents a case quite unusual in its cumulative effect in favor of respondents position."

Magone vs. Portland Mfg. C., (Oregon), 93 Pac., 450.

See also *Pigeon vs. Fuller*, 156 Cal., 691, 697, where it is said, citing cases:

"A servant is not precluded from recovery against a master who, without proper warning or instruction, puts him to work in a dangerous place by the fact that he may have some degree of comprehension of the danger. He will not be held to have consented to assume the risk unless there is a thorough comprehension on his part of the danger and the risk and a voluntary undertaking by him of that risk and danger."

It was further held in that case, *ibid*, p. 698:

"Entire ignorance of the danger on the part of plaintiff was not therefore essential to a recovery. He was entitled to a verdict and judgment if he satisfied the jury that he had some degree of knowledge of the dangerous character of the employment, but did not understand or appreciate its full nature and extent."

Moreover, if the master had warned the boy of the particular danger which he encountered to his mutilation, who can say that he would not have refused to expose himself at all to this superadded work and its danger?

Since he was by the settled course of decisions in this state, entitled to this warning and instruction, can the master, having committed the breach of that duty, be now

heard to say, as a matter of law, that this youth even though so warned, would nevertheless have consented to expose himself as he was ordered to do? Since there concur here on part of the master both the sin of omission in failing to instruct and warn, and the sin of commission in ordering and requiring the exposure of the servant to the danger, extraordinary, both because outside of his regular work and because extraneous to any function of the mill, how can it be said that the case of the secondary assumption of risk is so clear and positive, that it became a matter of law, and left nothing to go to the jury?

We submit that the argument in support of such a conclusion harks back to what Lord Bramwell in adhering to the views expressed by him in *Dynen vs. Leach*, *supra*, is reported to have said in *Smith vs. Barker*, 60 L. J. Q. B. N. S., 683:

“That a master is entitled to carry on his business in a dangerous way ‘*if the servant is foolish enough to agree to it!*’ ”

Labatt, Master & Servant, p. 2583, note 2.

We submit that unless we have much mistaken the attitude of the Supreme Court of the United States and of the courts of last resort of California upon the question of what is due from a master, especially to a youthful servant, before such master can discharge himself from responsibility for injuries caused by his own negligence, on the ground of assumption by the servant of the risk as a matter of law, there has been accomplished a vast advance in these jurisdictions in the direction of closing the breach which the doctrine of assumed risk, as expounded by Lord Bramwell, created between the law and common morality; and that this case was properly submitted to the jury.

See Labatt, Master & Servant, section 960, *supra*, and notes.

As bearing upon the assignments of error in that there was not included in the instructions V, VI, VII and VIII, or any other instructions, a direction that it was incumbent upon the plaintiff to exercise ordinary care to discover dangers caused by the negligence of the defendant, we cite, in addition to *Texas & P. Ry. Co. vs. Archibald*, 170 U. S., 665, 671, and *Choctaw etc., Ry. Co. vs. McDade*, 191 U. S., 64, 67, the case of *Gila Valley G. N. R. Co. vs. Hall*, 232 U. S., 94 (U. S. Adv. Ops., 1913, p. 229, 231) *supra*, and cases therein cited. The court in the case last cited approved an instruction that,

“The true test is not in the exercise of ordinary care to discover dangers by the employee, but whether the defect is *known* or plainly observable by him.”

Respectfully submitted,

HUNSAKER & BRITT,

HAINES & HAINES,

Attorneys for Defendant in Error.

No. _____

2411

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD STROECKER, as Trustee of the Estate of
H. J. Patterson, a Bankrupt,

Appellant,

vs.

MARIAM A. PATTERSON and H. J. PATTERSON,
Appellees.

Transcript of Record.

Upon Appeal from United States District Court of the
Territory of Alaska, Fourth
Division.

FILED

APR 20 1914

No. _____

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD STROECKER, as Trustee of the Estate of
H. J. Patterson, a Bankrupt,
Appellant,
vs.
MARIAM A. PATTERSON and H. J. PATTERSON,
Appellees.

Transcript of Record.

**Upon Appeal from United States District Court of the
Territory of Alaska, Fourth
Division.**

Due service and receipt of three copies hereof ad-
mitted this.....31st.....day of March, 1914.

A. R. Heilig

Attorney for Appellees.

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Names and Addresses of Attorneys of Record.

LOUIS K. PRATT & SON, and McGOWAN & CLARK, Attorneys for Plaintiff and Plaintiff in Error, Fairbanks, Alaska.

A. R. HEILIG, Attorney for Defendants and Defendants in Error, Fairbanks, Alaska.

In United States District Court for the Territory of Alaska, Fourth Division.

No. 1769

EDWARD STROECKER, as Trustee of the Estate of H. J. Patterson, a Bankrupt,

Plaintiff,

vs.

MARIAM A. PATTERSON and H. J. PATTERSON,
Defendants.

Stipulation Relative to Printing Record.

IT IS HEREBY STIPULATED that in printing the papers and records to be used on the hearing of the appeal taken in the above entitled cause, for the consideration of the Circuit Court of Appeals for the Ninth Circuit, that the title of the court and cause in full on all papers shall be omitted, except on the first page of said record, and that there shall be inserted in the place of said title, in all papers used as a part of said record, the words "Title of Court and Cause"; also that all endorsements on all papers, except the clerk's filing marks and admission of service, need not be printed.

Dated at Fairbanks, Alaska, this January 14th,
1914.

McGOWAN & CLARK,
Attorneys for Plaintiff.
A. R. HEILIG,
Attorney for Defendants.

Filed in the District Court, Territory of Alaska,
4th Div., Jan. 15, 1914. Angus McBride, Clerk. By
P. R. Wagner, Deputy.

[Title of Court and Cause.]

Praecipe for Transcript.

To Angus McBride, Clerk of the Above-entitled
Court:

You will please prepare transcript of the record
in the above entitled cause, to be filed in the office
of the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit, sitting at San Fran-
cisco, California, upon the appeal heretofore perfect-
ed to said court, and will include in said transcript
the following papers and records, to-wit:

1. Complaint,
2. Separate answer of H. J. Patterson.
3. Separate answer of Miriam A. Patterson,
4. Reply to separate answer of H. J. Patterson.
5. Reply to separate answer of Miriam A. Pat-
terson,
6. Bill of exceptions and order allowing and set-
tling same,
7. Consent order for deposit of royalties in court,
8. Order after judgment for depositing royalties
in court,

9. Order relative to supersedeas bond and cost bond on appeal,
10. Supersedeas bond and cost bond on appeal (one instrument),
11. Assignment of error,
12. Petition for appeal,
13. Order allowing appeal and fixing amount of cost bond,
14. Cost bond on appeal,
15. Citation on appeal,
16. Designation of place for hearing appeal,
17. Order extending time within which to file appeal,
18. Praecipe for transcript,
19. Stipulation relative to printing record.

This transcript to be prepared, as required by law, and the orders and rules of this court and of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of said United States Circuit Court of Appeals, at San Francisco, California, on or before the first day of April, A. D. 1914, pursuant to order of this court, extending time.

Fairbanks, Alaska, February 26, 1914.

McGOWAN & CLARK,
Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska, 4th Div., Feb. 26, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Complaint.

Comes now the above named plaintiff and for cause of action against defendants alleges:

I.—That, on the 16th day of April, 1912, H. J. Patterson, of Fairbanks Recording Precinct, Territory of Alaska, filed his voluntary petition in this Court, the same being No. 35 B., on the records of said Court, praying that he be declared a bankrupt and be given the benefit of the National Bankruptcy Act, and on the 16th day of April, 1912, this honorable Court duly declared said Patterson a bankrupt.

II.—That, at an adjourned session of the first meeting of the creditors of said bankrupt, on the 4th day of May, 1912, duly and regularly called and convened by the Referee in Bankruptcy of this Court for this Precinct, for the purpose of electing a Trustee of the estate of said H. J. Patterson, all the creditors present whose claims had been filed and allowed, appointed this plaintiff unanimously to said office of Trustee, which was accepted by plaintiff, and plaintiff thereafter duly and regularly qualified as such Trustee, in the manner prescribed by law, and ever since said time has been, and now is, the duly appointed, qualified, and acting Trustee of the estate of H. J. Patterson, a bankrupt.

III.—That, in the petition of said bankrupt, he sets up that he has creditors whose claims amount to something over thirty-five thousand dollars and that his assets are worth only about five thousand dollars. Claims of said creditors, some of them judg-

ment creditors, have been filed and allowed by said Referee in Bankruptcy, amounting to about \$25,000.-00, and bankrupt's assets do not exceed the amount set forth in his petition.

IV.—That, on the 27th day of November, 1911, said defendant H. J. Patterson was insolvent and unable to pay his debts due and owing to various persons in an amount in excess of thirty thousand dollars, while said Patterson's assets did not exceed in value the amount of ten thousand dollars, and on said 27th day of November, 1911, said H. J. Patterson was the legal and equitable owner and entitled to the immediate and exclusive possession of an undivided one-quarter interest in that certain placer mining claim known as the Daly Bench placer mining claim, situate, lying, and being in the second tier of benches on the left limit of Ester Creek, opposite creek placer mining claim No. Three below Discovery on said Ester Creek, all in the Fairbanks Recording Precinct, Territory of Alaska.

V.—That, on said 27th day of November, 1911, said H. J. Patterson, for the purpose of defrauding, hindering, and delaying his creditors, and especially the creditors whose claims are on file and allowed as above set forth, they being his creditors on said 27th day of November, 1911, in the same amounts and then due, without any consideration of any kind conveyed and transferred, by an instrument in writing duly executed and recorded, all of his title to said one-quarter interest in said Daly Bench, to his wife, Mariam A. Patterson, and said Mariam A. Pat-

terson received the title to said claim at said time and is still holding it in trust for said H. J. Patterson, to aid him in defrauding and cheating his creditors, and said H. J. Patterson still is the real owner thereof, although the legal title is in his wife's name, and said mining claim is not listed by said bankrupt in his said petition as belonging to him in any manner either legally or equitably.

VI.—That, prior to said fraudulent transfer as above set forth, said H. J. Patterson was the owner of a lay or lease agreement, covering the whole of said Daly Bench hereinbefore particularly described, and thereafter and prior to the commencement of this action and prior to his adjudication in bankruptcy, for a valuable consideration, assigned and transferred said lay to H. C. Hamilton, who is now the owner and holder thereof and is mining said ground under the terms and conditions of said original lay and said sub-lease made by said H. J. Patterson to said H. C. Hamilton.

VII.—That under and by virtue of the terms and conditions of said sub-lease and arrangements made subsequent thereto, said H. J. Patterson was entitled to receive from said mining operations so conducted by said Hamilton five per cent. of the gross output of said ground.

VIII.—That said interest of said Patterson in said lease has never been assigned or transferred to any person or persons whomsoever, and said Patterson is now entitled to receive five per cent. of the gross output of said ground during the life of said lease.

IX.—That said Mariam A. Patterson claimed, by virtue of her alleged ownership of said property, to be entitled to receive said five per cent. of the gross mineral output of said claim and to be the assignee of all benefits under said lease, by virtue of said transfer of said undivided one-quarter interest in and to said property, made by said H. J. Patterson to her on the 23rd day of November, 1911, as aforesaid.

X.—That plaintiff herein has no objections to said layman continuuing operations on said ground and is willing to have said layman continue mining operations on payment of the royalties prescribed in said lease and sub-lease hereinbefore set forth.

XI.—That, on or about the 8th day of May, 1912, said H. C. Hamilton held his first cleanup on said ground from the dump extracted by him from said ground during the spring of the year 1912, and, at the time of said cleanup, the defendants above named demanded the payment to them of five per cent. of the gross output thereof.

XII.—That said Hamilton now has in his possession said five per cent. of said cleanup, which he then and there refused to pay to said defendants, and will, from time to time as said winter dump is cleaned up, have other sums of money claimed by said Mariam A. Patterson under and by virtue of said fraudulent conveyance from H. J. Patterson to said Mariam A. Patterson, hereinbefore particularly described, and said defendants Mariam A. Patterson and H. J. Patterson will demand and receive from said H. C. Hamilton said five per cent. of said

gross output, unless restrained by this Court.

XIII.—That plaintiff is informed and believes and so alleges that said Mariam A. Patterson is insolvent, and that, if said Mariam A. Patterson secures possession of said five per cent. of the gross output of said ground, it will be for ever lost to the creditors of said H. J. Patterson and to plaintiff herein as trustee thereof.

XIV.—That plaintiff is informed and believes and so alleges that said Mariam A. Patterson has no right, title, or interest in or to said gold and gold dust or any part thereof, and that plaintiff herein is entitled to receive said five per cent. of said gross output, by virtue of being Trustee for the creditors of said H. J. Patterson, and said sum should be applied toward the payment of said creditors' claims.

XV.—That a Receiver should be appointed to receive said gold and gold dust and to hold the same until the title thereto can be ascertained, or to pay the same into the registry of this Court, there to be held until the title to the same can be determined.

XVI.—That plaintiff has no plain, speedy, or adequate remedy at law, and no means of enforcing his right to collect said five per cent. of the gross output of said ground, without the intervention of a Court of Equity.

WHEREFORE: Plaintiff prays as follows, to-wit:

I.—For a temporary restraining order, restraining the said defendants, and each of them, their agents, representatives, servants, employes, and attorneys, from demanding or attempting to collect or receive

said five per cent. of the gross mineral output of said Daly Bench placer mining claim, or any part thereof, until the further orders of this Court.

2.—That a Receiver be appointed, with authority to demand and receive from said H. C. Hamilton, or his representatives or assigns five per cent. of the gross mineral output of said Daly Bench, and to hold the same until the ownership thereof can be determined by this Court; or, for an order directing the said H. C. Hamilton, his agents or assigns, to pay said five per cent. of the gross mineral output of said claim into the registry of this Court, there to await the further disposition thereof by order of this Court.

3.—For a decree of this Court, decreeing that the transfer from said H. J. Patterson to said Mariam A. Patterson was fraudulent and is void, and was made by said H. J. Patterson with the purpose, intention, and design of cheating, defrauding, hindering, and delaying his said creditors, and that said Mariam A. Patterson holds the title to an undivided one-quarter interest in said Daly Bench in trust for H. J. Patterson and, by virtue of the appointment of the plaintiff herein as Trustee for the creditors of said H. J. Patterson, in trust for said plaintiff herein as successor in interest of said H. J. Patterson.

4.—For a decree of this Court, decreeing that said Mariam A. Patterson has no right, title, or interest in or to said property or any part thereof or in or to any gold or gold dust extracted therefrom.

5.—For a decree of this Court, decreeing that plaintiff herein is entitled to receive five per cent. of the

gross mineral output of said ground, as Trustee for the creditors of said H. J. Patterson.

6.—For an order of this Court, directing said Mariam A. Patterson to re-convey said property, to-wit, an undivided one-quarter interest in and to the Daly Bench placer mining claim, hereinbefore particularly described, to the plaintiff herein as Trustee for the creditors of H. J. Patterson, a bankrupt.

7.—For an order fixing the time and place when said defendants shall appear and show cause, if any they have, why said restraining order should not be continued during the pendency of this action.

8.—For costs of suit and for such other and further relief as is just, meet, and equitable in the premises.

LOUIS K. PRATT & SON,
McGOWAN & CLARK,

Attorneys for Plaintiff.

Territory of Alaska,
Fairbanks Precinct,—

EDWARD STROECKER, being first duly sworn according to law, on his oath deposes and says:

I am the plaintiff in the above entitled action; I have read the within and foregoing complaint, know the contents thereof, and the same is true as I verily believe.

EDWARD STROECKER.

Subscribed and sworn to before me this eleventh day of May, A. D. one thousand nine hundred twelve.

(Seal)

JOHN A. CLARK,

Notary Public in and for the Territory of Alaska.

Filed in the District Court, Territory of Alaska,

4th Div., May 11, 1912. C. C. Page, Clerk. By H. C. Green, Deputy.

[Title of Court and Cause.]

Separate Answer of Mariam A. Patterson.

Comes now the defendant Mariam A. Patterson and
for her separate answer to the complaint herein

Denies each and every allegation contained in paragraph IV thereof, excepting that she admits that on the morning of November 27, 1911, the bare legal title to an undivided one-quarter interest in the mining claim described in said paragraph stood in the name of H. J. Patterson, and alleges that at that time the said H. J. Patterson was not the actual, real nor equitable owner of said interest but that she, this defendant, was at that time, and had been for a long time prior thereto, the actual real and equitable owner thereof;

2. Denies each and every allegation contained in paragraph V thereof, excepting that she admits that in the evening of November 27, 1911, the said H. J. Patterson did, by instrument in writing, duly executed and delivered, convey to this defendant the bare legal title to said quarter interest theretofore standing in his name, and that this defendant then and there received the bare legal title to said interest, and that the legal title to said interest has since said time been, and now is, in this defendant, and admits that said interest is not listed by the said H. J. Patterson in his schedule of assets in said bankruptcy proceedings.

3. Denies the allegation contained in paragraph VI that said H. J. Patterson was the owner of a lease covering the whole of said Daly Bench, but admits that prior to the transfer by him to her of the bare legal title to said quarter interest he had a lay or lease upon the undivided three-fourths interest in said Bench belonging to James Wickersham, and admits that he assigned said lease to H. C. Hamilton and that he executed a lease of the other quarter interest belonging to this defendant to the said Hamilton shortly before he transferred to her the bare legal title thereto theretofore held by him.

4. Denies the allegation contained in paragraph VII that said H. J. Patterson was at any time entitled to receive from the mining operations conducted by said Hamilton five per cent. or any part of the gross output of said ground by virtue of his alleged ownership of a quarter interest therein, but alleges that this defendant was then and is now entitled to receive said five per cent of the gross output as the actual, legal and equitable owner of said quarter interest.

5. Denies each and every allegation contained in paragraphs VIII, XIII, XIV, XV and XVI thereof.

6. She admits that she claims to be entitled to receive the five per cent of the gross output of said mining claim, referred to in paragraph IX, but denies that her claim is based solely upon the transfer to her of the bare legal title to said quarter interest made by said H. J. Patterson to her on November 27, 1911, and alleges that long prior to said date she

was the actual, real and equitable owner of said quarter interest and now is the actual, legal and equitable owner thereof.

7. She denies the allegation contained in paragraph XI that the said H. J. Patterson demanded the payment to himself of five per cent of the gross output of said mining claim at the first cleanup but admits that she demanded payment to her at the first cleanup of five per cent of the gross output, upon the ground that she was the owner of a quarter interest in said mining claim.

And for a further defense and as an affirmative answer this defendant Mariam A. Patterson alleges

1. That on the 19th day of September, 1910, James Wickersham was the sole owner of placer mining claim known as the Daly Bench situate on the left limit of Esther creek in the Fairbanks Recording District, Alaska; that on said date said Wickersham entered into an agreement with H. J. Patterson whereby said Wickersham agreed to convey to said H. J. Patterson an undivided one-quarter interest in said mining claim if said H. J. Patterson would sink a hole to bedrock upon said claim and do the assessment work thereon for the year 1910;

2. That said H. J. Patterson agreed to said conditions, but desired to use what money he had for other purposes, and therefore, with the knowledge and consent of the said Wickersham, agreed with this defendant that if she would pay with her own funds the expense of sinking such hole to bedrock and of doing said assessment work, that she should

be entitled to receive and would receive a conveyance of said quarter interest instead of said H. J. Patterson;

3. That in pursuance of the agreement thus made between this defendant and H. J. Patterson, and with H. J. Patterson and the said Wickersham, this defendant did, at her own expense, on the 20th and 21st day of September, 1910, cause to be sunk a hole to bedrock and did cause to be done the assessment work for the year 1910, upon said claim, and with funds belonging to her and which were her separate property and estate, and in which the said H. J. Patterson had no interest whatever, she did on the 21st day of September, 1910, pay to the persons who performed said work at her instance and request the sum of \$225.00 for sinking such hole to bedrock and doing said assessment work.

4. That before said Wickersham had time to execute a deed conveying said quarter interest as he had agreed, he left the District of Alaska and remained without said District until late in the Fall of 1911; that after said Wickersham returned to Fairbanks, said H. J. Patterson requested him to make a deed conveying said quarter interest to this defendant upon the ground that she had performed the conditions of said contract, but the said Wickersham preferred to, and did, make such deed to the said H. J. Patterson, without the knowledge or consent of this defendant, and delivered the same to said H. J. Patterson on or about the 10th day of November, 1911, but with the express understanding

had between the said Wickersham and the said H. J. Patterson that the latter would convey the bare legal title to said quarter interest so received by him to this defendant.

5. That thereafter, when this defendant learned that said deed had been made and delivered to H. J. Patterson she demanded from him a conveyance of the legal title to her in pursuance of his said agreement with her, whereupon said H. J. Patterson did, on the evening of November 27, 1911, by deed convey to this defendant the legal title to said quarter interest then held by him.

6. That since the 21st day of September, 1910, this defendant has been at all times and now is the equitable owner of said quarter interest, and since the 27th day of November she has been at all times and now is the owner and holder of the legal and equitable title to said quarter interest, and is now and for a long time past has been in the actual possession thereof, and is entitled to and has the present right of possession thereof.

7. That since the 21st day of September, 1910, said H. J. Patterson has had no right, title nor interest, legal or equitable, in said quarter interest, and received the bare legal title thereto on or about the 10th day of November, 1911, for the sole purpose of transferring the same to this defendant, and executed said deed of conveyance to her on the 27th day of November, 1911, for the sole purpose of transferring to her the bare legal title then standing in his name and in performance of his agreement made

with her on September 19, 1910, and without any intent to hinder, delay or defraud any of his creditors.

8. That during the time said H. J. Patterson held the bare legal title to said quarter interest he made a lease thereof to H. C. Hamilton, reserving for said quarter interest as rent or royalty five per cent of the gross output of gold mined by said Hamilton from said mining claim during the term of such lease; that this defendant has assented to such lease and the rents and royalties therein reserved, and by virtue of her ownership of said quarter interest she is entitled to receive five per cent of the gross output of gold mined by said Hamilton, as rent or royalty, at each and every cleanup.

Wherefore this defendant prays judgment that plaintiff is not entitled to the relief claimed by him nor any part thereof, and that she is the legal and equitable owner of the quarter interest in said mining claim described in the complaint, and is entitled to the rents and royalties accruing therefrom; and that she recover her costs and disbursements herein.

A. R. HEILIG,

Atty. for Mariam A. Patterson.

District of Alaska,
Fourth Division,—ss.

Mariam A. Patterson being duly sworn deposes and says that she is one of the above named defendants; that the allegations contained in foregoing answer are true as she verily believes.

MARIAM A. PATTERSON.

Subscribed and sworn to before me this 20 day of May, 1912.

(Seal)

ALBERT R. HEILIG,

Notary Public, District of Alaska.

Received copy May 22, 1912.

McGOWAN & CLARK,

LOUIS K PRATT & SON,

Atty for Pltff.

Filed in the District Court, Territory of Alaska,
4th Div., May 22, 1912. C. C. Page, Clerk.

[Title of Court and Cause.]

Separate Answer of H. J. Patterson.

Comes now H. J. Patterson, one of the above-named defendants, and for his separate answer to the complaint herein

1. Denies each and every allegation contained in paragraph IV thereof, excepting that he admits that on the morning of November 27, 1911, the bare legal title to an undivided one-quarter interest in the mining claim described in said paragraph stood in the name of H. J. Patterson, and alleges that at that time the said H. J. Patterson was not the actual, real nor equitable owner of said interest but that the defendant Mariam A. Patterson was at that time, and had been for a long time prior thereto the actual, real and equitable owner thereof.

2. Denies each and every allegation contained in paragraph V thereof, excepting that he admits that in the evening of November 27, 1911, he did, by in-

strument in writing duly executed and delivered, convey to the defendant Mariam A. Patterson the bare legal title to said quarter interest theretofore standing in his name, and that said defendant Mariam A. Patterson then and there received the bare legal title to said interest, and that the legal title to said interest has since said time been, and now is, in the defendant Mariam A. Patterson, and that said interest is not listed by him in his schedule of assets filed with his petition in bankruptcy.

3. Denies the allegation contained in paragraph VI that he was the owner of a lease covering the whole of said Daly Bench, but admits that prior to the transfer by him to Mariam A. Patterson of the bare legal title to a quarter interest in said bench he had a lay or lease upon the undivided three-fourths interest in said bench belonging to James Wickersham, and admits that he assigned said lease to H. C. Hamilton, and that he executed a lease of the other quarter interest belonging to the defendant Mariam A. Patterson to the said H. C. Hamilton shortly before he transferred to the said Mariam A. Patterson the bare legal title thereto theretofore held by him.

4. Denies the allegation contained in paragraph VII that he was at any time entitled to receive from the mining operations conducted by said Hamilton five per cent or any part of the gross output of said ground by virtue of his alleged ownership of a quarter interest therein, but alleges that the defendant Mariam A. Patterson was then and is now entitled to receive said five per cent of the gross output as

the actual, legal and equitable owner of said quarter interest.

5. Denies each and every allegation contained in paragraphs VIII, XIII, XIV, XV and XVI thereof.

6. He admits that defendant Mariam A. Patterson claims to be entitled to receive the five per cent of the gross output of said mining claim, referred to in paragraph IX but denies that her claim is based solely upon the transfer to her of the bare legal title to said quarter interest made by him on November 27, 1911, and alleges that long prior to said date she was the actual, real and equitable owner of said quarter interest and now is the actual, legal and equitable owner thereof.

7. Denies the allegation contained in paragraph XI that he demanded the payment to himself of five per cent of the gross output of said mining claim at the first cleanup but admits that the defendant Mariam A. Patterson demanded payment to her at the first cleanup of five per cent of the gross output. As a further and affirmative answer to said complaint he alleges

1. That on the 19th day of September, 1910, James Wickersham was the sole owner of the placer mining claim known as the Pat Daly Bench situate on the left limit of Esther creek in the Fairbanks Recording District Alaska; that on said date said Wickersham entered into an agreement with this defendant whereby said Wickersham agreed to convey to this defendant an undivided one-quarter interest in said mining claim if this defendant would sink a

hole to bedrock upon said claim and do the assessment work thereon for the year 1910;

2. That this defendant agreed to said conditions but desired to use what money he had for other purposes and therefore with the knowledge and consent of the said Wickersham agreed with the defendant Mariam A. Patterson that if she would pay with her own funds the expense of sinking such hole to bedrock and of doing said assessment work that she should be entitled to receive, and would receive, a conveyance of said quarter interest instead of this defendant.

3. That in pursuance of the agreement thus made between this defendant and Mariam A. Patterson and with this defendant and the said Wickersham, the defendant Mariam A. Patterson did, at her own expense, on the 20th and 21st days of September, 1910, cause to be sunk a hole to bedrock and did cause to be done the assessment work for the year 1910 upon said claim; and with funds belonging to her and which were her separate estate and property, and in which this defendant had no interest whatever, she did on the 21st day of September, 1910, pay the sum of \$225.00 for sinking such hole to bedrock and doing said assessment work.

4. That before said Wickersham had time to execute a deed conveying said quarter interest as he had agreed, he left the District of Alaska and remained without said district until late in the Fall of 1911; that after said Wickersham returned to Fairbanks this defendant requested said Wickersham to

make a deed conveying said quarter interest to the defendant Mariam A. Patterson upon the ground that she had performed the conditions of said contract, but the said Wickersham preferred to, and did, make such deed to this defendant, and delivered the same to him on or about the 10th day of November, 1910, with the express understanding had with him at the time of such delivery that this defendant would convey the bare legal title to said quarter interest so received by him to the said Mariam A. Patterson.

5. That thereafter, when the said Mariam A. Patterson learned that said deed had been made and delivered to this defendant, she demanded from him a conveyance of the legal title to her in pursuance of their said agreement, whereupon this defendant did on the evening of the 27th day of November, 1911, by deed convey to the said Mariam A. Patterson the legal title to said quarter interest.

6. That since the 21st day of September, 1910, said Mariam A. Patterson has been at all times and now is the equitable owner of said quarter interest, and since the 27th day of November, 1911, she has been at all times and now is the owner and holder of the legal and equitable title to said quarter interest, and is now and for a long time past has been in the actual possession thereof, and is entitled to and has the present right of possession thereof.

7. That since the 21st day of September, 1910, this defendant has had no right, title nor interest, legal or equitable, in said quarter interest, and re-

ceived the bare legal title thereto on or about the 10th day of November, 1911, for the sole purpose of transferring the same to said Mariam A. Patterson, and executed said deed of conveyance to her on the 27th day of November, 1911, for the sole purpose of transferring to her the bare legal title then standing in his name and in performance of his agreement made with her on September 19, 1910, and without any intent to hinder, delay or defraud any of his creditors.

8. That during the time that this defendant held the bare legal title to said quarter interest he made a lease thereof to H. C. Hamilton, reserving for said quarter interest as rent or royalty five per cent of the gross output of gold mined by said Hamilton from said mining claim during the term of such lease; that the defendant Mariam A. Patterson has assented to such lease and the rents and royalties therein reserved, and by virtue of her ownership of said quarter interest she is entitled to receive five per cent of the gross output of gold mined by said Hamilton, at each and every cleanup as such rent or royalty.

Wherefore this defendant prays judgment that plaintiff is not entitled to the relief claimed by him nor any part thereof, and that she, the said Mariam A. Patterson is the legal and equitable owner of the quarter interest in said mining claim and entitled to the rents and royalties accruing therefrom; and that he recover his costs and disbursements herein.

A. R. HEILIG,
Atty. for H. J. Patterson.

District of Alaska,
Fourth Division,—ss.

H. J. Patterson being duly sworn deposes and says that he is one of above named defendants; that the allegations contained in foregoing answer are true as he verily believes.

H. J. PATTERSON.

Subscribed and sworn to before me this 17 day of May, 1912.

(Seal)

ALBERT R. HEILIG,

Notary Public, District of Alaska.

Received copy May 22, 1912.

McGOWAN & CLARK,

LOUIS K. PRATT & SON,

Atty. for Pltff.

Filed in the District Court, Territory of Alaska,
4th Div., May 22, 1912. C. C. Page, Clerk.

[Title of Court and Cause.]

Reply to Answer of Defendant H. J. Patterson.

Comes now the above named plaintiff and in reply to the separate answer of defendant H. J. Patterson, states:

Denies each and every allegation of new matter in a said answer contained.

In reply to defendant H. J. Patterson's "Further and Affirmative Answer", plaintiff states:

1. Denies the allegations contained in paragraphs 2, 3, and 4 thereof.

2. Denies each and every allegation of paragraph 5, except that he admits H. J. Patterson executed a

deed, bearing the date November 27th, 1911, conveying the legal title to said quarter interest, to said Mariam A. Patterson.

3. Denies each and every allegation in paragraph 6 thereof except that he admits said defendant Miriam A. Patterson has been the legal owner to said interest since Nov. 27th, 1911.

4. Denies the allegations of paragraph 7.

5. Plaintiff has not sufficient information upon which to base a belief as to the truth or falsity of the allegations contained in paragraph 8 thereof and therefore denies the same.

WHEREFORE, plaintiff asks for the relief prayed for in his complaint.

McGOWAN & CLARK,
LOUIS K. PRATT & SON,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Edward Stroecker being first duly sworn on oath says: I am the plaintiff in the above entitled suit; I have read the foregoing reply and the allegations therein contained are true as I verily believe.

EDWARD STROECKER.

Subscribed and sworn to before me this 25th day of Sept., 1913.

(Seal)

HARRY E. PRATT,
Notary Public in and for Alaska.

My commission expires June 24th, 1916.

Service of the foregoing reply, by copy thereof is

hereby admitted this 25th day of September, 1913.

A. R. HEILIG,

Attorney for Defendants.

Filed in the District Court, Territory of Alaska,
4th Div., Sep. 25, 1913. C. C. Page, Clerk. By P. R.
Wagner, Deputy.

[Title of Court and Cause.]

Reply to Answer of Mariam A. Patterson.

Comes now the above named plaintiff and in reply to the separate answer of defendant Mariam A. Patterson states:

Denies each and every allegation of new matter in said answer contained.

In reply to defendant Mariam A. Patterson's "Further Defense and Affirmative Answer", plaintiff states:

1. Denies the allegations contained in paragraphs 2 and 3 thereof.

2. Denies the allegations contained in paragraph 4 thereof.

3. Denies the allegations contained in paragraph 5 thereof except that he admits H. J. Patterson executed a deed, bearing the date November 27th, 1911, conveying the legal title to said quarter interest.

4. Denies each and every allegation in paragraph 6 thereof except that he admits that said defendant has been the holder of the legal title to said interest since November 27th, 1911.

5. Denies each and every allegation in paragraph 7.

6. Plaintiff has not sufficient information upon which to base a belief as to the truth or falsity of the allegations contained in paragraph 8 thereof and therefore denies the same.

Wherefore plaintiff prays judgment as in his complaint set forth.

McGOWAN & CLARK,
LOUIS K. PRATT & SON.

Territory of Alaska,
Fourth Division,—ss.

Edward Stroecker, being first duly sworn on oath says: I am the plaintiff in the above entitled suit; I have read the foregoing reply and the allegations therein contained are true as I verily believe.

EDWARD STROECKER,

Subscribed and sworn to before me this 25th day of Sept., 1913.

(Seal)

HARRY E. PRATT,
Notary Public in and for Alaska.

My commission expires June 24th, 1916.

Service of the above reply, by receipt of copy thereof, is hereby admitted this 25th day of September, 1913.

A. R. HEILIG,
Attorney for Defendants.

Filed in the District Court, Territory of Alaska, 4th Div., Sep. 25, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED: That this case came on regularly for trial before Honorable Frederick E. Fuller, judge, sitting without a jury, at 10 o'clock A. M., September 26th, 1913, when the following proceedings were had and testimony was taken: Messrs. Harry E. Pratt and John A. Clark, appeared as attorneys for plaintiff, and Mr. A. R. Heilig appeared as attorney for defendants.

Mr. Pratt made a statement of the case in behalf of the plaintiff, and Mr. Heilig made a statement of the case in behalf of the defendants.

H. J. PATTERSON, called as a witness for plaintiff, being duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION.

By Mr. PRATT.—Q. Mr. Patterson, you are one of the defendants in this action?

A. Yes, sir.

Q. You are the husband of the other defendant, are you not?

A. I am.

Q. Mr. Patterson, upon the 27th of November, 1911, you owed something over thirty thousand dollars, didn't you, in debts?

A. I think that the statement that Mr. Marquam made up of my expenses was thirty-two thousand, or something like that.

Q. Thirty-two thousand?

A. Something like that.

Q. Now, the property which you had at that time consisted of the same property that you listed in your petition in bankruptcy, didn't it?

A. It did, besides the ground that was blocked out. The ground that was blocked out wasn't taken into consideration.

Q. That is, the bankruptcy petition contains all of the property which you had on the 27th of November, except your lay on the Last Chance Association claim on Engineer Creek. Is that a fact?

Mr. HEILIG.—This bankruptcy petition is in writing, and I think they are asking the witness too much to recollect a petition which was filed in April, 1912, and we submit the records.

Mr. CLARK.—We are not asking for the contents. We are asking if it contained all of his property.

The COURT.—The witness has the privilege of examining it if he desires.

Mr. PRATT.—Q. I will ask you whether you disposed of any of your property between the 27th of November, 1911, and the time you filed your petition in bankruptcy, (interrupted)

A. No, I did not.

Q. —excepting the lay on the Last Chance Association on Engineer?

A. No, sir.

Q. Aside from that, there was nothing disposed of in between time?

A. No.

Q. And the value of your property, as set up, in your bankruptcy petition, was the same on the 27th day of November, 1911, as it was at the time the petition was filed, was it not?

A. I think it was.

Mr. PRATT.—I would like to offer the petition in bankruptcy in evidence in this case.

Mr. HEILIG.—I shall object thereto, as unnecessarily incumbering the record. Counsel can read from it into the record anything that he says is pertinent to the matter, but I object to the offer of the whole instrument.

Mr. PRATT.—I would just as soon read the portions then.

The petition in bankruptcy sets up that you have household goods and furniture and a house on placer claim number 4 below discovery on Ester Creek of the value of \$150.00; wearing apparel \$150.00; watch and jewelry \$50.00. That you have one tank 40 by 6 by 6, one tank 12 by 6 by 6, 400 feet of $\frac{3}{4}$ -inch cable, one saw arbor, 30-inch circular rip saw, one 30-inch cut-off saw, one Rochester lamp, 50 pounds boiler compound, 3 cars, 200 feet of 3-inch pipe, one house; all on the lower 1,000 feet of the Last Chance Association, valued at \$1,000. One 80-horsepower marine boiler situated on the Last Chance Association claim on Engineer Creek, \$1,600. Due from T. Peterson for money paid to him on account of wood not delivered \$1,101.95. Due by Arthur McNeer of Fairbanks, Alaska, for money paid him on account of wood and timber contracted for and not delivered

\$984. Undivided one-eighth interest in the Junction Association placer mining claim, situate on Caribou Creek, a tributary of Nome Creek, a tributary of Beaver River, in the Fairbanks Recording District, Alaska; estimated value, unknown. Undivided one-eighth interest in the Paystreak Association placer mining claim, situate on Alder Creek, a tributary of Ester Creek, in the Fairbanks Recording District, Alaska, value unknown. That is all the property which you have set up in your petition. That was all you had on the 27th of November, 1911?

A. Yes, sir.

Q. And you claim an exemption on that household furniture and the wearing apparel?

A. Yes, sir.

Q. Now, those mining claims which you mention in your schedule were just "wildcats" and of no value, were they?

A. I never saw them at all. Parties told me they had staked me in.

Q. They had no market value at all?

A. Not that I could tell. They might possibly be good, and they might not. The Caribou Creek mining claim, there are good possibilities on that, according to the parties that staked it. He owns about twelve miles of ground there, and there is a possibility of something good there. They had found good prospects. I had prospected on the creek below, and it showed very favorable. It was shallow, a good working proposition, the creek below that. Outside of that, I know nothing about it.

Q. Your lay on the Last Chance Association claim on Engineer Creek you forfeited the next day after the 27th, didn't you?

A. I assigned it.

Q. You assigned it over?

A. Yes.

Q. Did you get any consideration for it?

A. No, sir.

Q. What was the value of that lay in your estimation on the 27th?

A. Well, it was pretty hard to estimate.

Q. You couldn't have sold it for anything, could you?

A. I could not have sold it for anything. But if it had been properly worked, I am satisfied it was equal to the debts, but I couldn't say that there was profit in that particular ground or not. But there were two blocks of ground untouched above, included in that lay, and which could have been opened up much easier than the piece of ground that I did open.

Q. But you couldn't have sold it for anything at that time.

A. I don't know as I could. The people—(Interrupted)

Q. The ground was wet, wasn't it?

Mr. HEILIG.—Let him finish his answer.

Mr. PRATT.—I want an answer yes or no? Q. The ground was wet, was it not?

A. Yes.

Q. What was the value of the Daly Bench upon the 27th of November, 1911?

A. Well, it was of unknown value. There were no holes to bedrock.

Q. It was considered—(Interrupted)

A. There was no pay struck on that ground at that time.

Q. It was considered valuable, was it not?

A. It was guess work.

Q. Horner and Wheeler and Wagner had struck rich pay up above it?

A. They had.

Q. And the presumption was that the paystreak ran right across the Daly Bench?

A. No. They put down two drill holes on the Daly Bench, and, as far as I found out, they got no pay in either one of them. And Wheeler and Wagner's idea was that the pay just crossed a very small corner of the Daly Bench, and that was their reason for compromising for seventy-five feet off of the upper end of the Daly Bench—compromising that litigation. And as Wichman told me after the compromise was made: "Anything you can get out of that ground, you can put in your eye."

Q. It was pretty generally, among other people, thought to be a rather valuable claim?

Mr. HEILIG.—We object as too general.

A. Everybody had their idea in which way the paystreak ran.

Mr. PRATT.—Q. It could have been sold in the market for considerable over ten thousand dollars at that time?

Mr. HEILIG.—What is that?

A. On the 27th of November, 1911?

Mr. HEILIG (to Mr. Pratt).—What are you referring to?

Mr. PRATT.—The Daly Bench.

A. I think it is possible.

The COURT.—Q. What was the answer?

A. It is possible.

Mr. HEILIG.—I didn't catch that question.

Mr. PRATT.—I asked if it couldn't have been sold in the market upon the 27th day of November, 1911, for over ten thousand dollars.

Mr. HEILIG.—The whole of the Daly Bench?

Mr. PRATT.—Yes.

Mr. HEILIG.—If the witness knows.

Q. (Witness) I suppose it could have been. Everybody was anxious—everybody had their idea of which way the paystreak ran. Some people thought it came diagonally across the claim and others thought there was just a little pay on one corner.

Mr. PRATT.—Q. Since that time it has been worked upon a lay?

A. Yes.

Q. A lease?

A. Yes.

Q. And the royalties accruing to a one-quarter interest have amounted to over five thousand dollars, haven't they?

A. I believe they have.

Q. The royalty to one-quarter being five per cent?

A. Yes. There has been something over a hundred thousand dollars came out of that corner of the

Daly Bench.

Mr. PRATT.—I offer in evidence a certified copy of the deed from H. J. Patterson to Mariam A. Patterson made on the 27th of November, 1911.

Mr. HEILIG.—We will object to the offer purely upon the ground that it is unnecessarily incumbering the record. We have alleged in our answer this very deed, and they have alleged in their reply,—set up affirmatively that this transfer was made on this day by this defendant.

Mr. PRATT.—For this reason: The deed shows the consideration to be one dollar, and also there are recitals, and I would like to have the deed in evidence.

Mr. HEILIG.—We insist upon our objections.

The COURT.—It may be admitted, if that is the only objection, but it does not appear to me to be necessary.

(Marked as Plaintiff's Exhibit "A".)

PLAINTIFF'S EXHIBIT "A".

35329

THIS INDENTURE made and entered into this 27th day of November, A. D. 1911, by and between H. J. Patterson, of Fairbanks, Alaska, party of the first part, and Mariam A. Patterson, of the same place, party of the second part,

WITNESSETH: That the party of the first part, for and in consideration of the sum of One Dollar (\$1.00) lawful money of the United States of America, to him in hand paid by the party by the second

part, the receipt of which is hereby acknowledged, hath, granted, bargained, and sold, conveyed, remised, released and quitclaimed, and by these presents doth grant, bargain, sell, convey, remise, release and forever quitclaim unto the said party of the second part, her heirs and assigns, all his right, title and interest, being an undivided one-fourth interest of, in and to that certain bench placer mining claim situate in the Fairbanks Precinct, Alaska, on the left limit of Ester Creek, and known as the Pat Daly bench placer mining claim, being the second bench claim on the left limit and about opposite No. Three (3) creek claim below Discovery on said Ester Creek, and located by Pat Daly on December 1st, 1905;

TO HAVE AND TO HOLD the same, together with the appurtenances and improvements thereon, to and unto the said party of the second part, her heirs and assigns forever.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal this the day and year first above written.

H. J. PATTERSON. [Seal]

Signed, sealed and delivered in the presence of
G. B. Erwin, F. R. Clark.

United States of America,
Territory of Alaska,
Fairbanks Precinct,—ss.

THIS IS TO CERTIFY that on this 27th day of November, A. D. 1911, before me, the undersigned, a notary public in and for the Territory of Alaska, duly commissioned and sworn, personally came H. J.

Patterson, known to me to be the person described in and who executed the foregoing quitclaim deed, and who acknowledged to me that he executed and delivered the same freely and voluntarily, for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF I have hereunto set my notarial seal and hand the day and year in this certificate first above written.

[Seal]

G. B. ERWIN,

A Notary Public in and for the Territory of Alaska.

Filed for record: 1 day of December, 1911, at 30 min. past 9 A. M.

John F. Dillon, Recorder.

By C. E. Wright, Deputy.

Mr. PRATT.—Q. Mr. Patterson. This deed from yourself to your wife upon the 27th day of November, 1911, recites that it is given in consideration of one dollar. As a matter of fact, you received nothing upon the 27th in payment for this deed—consideration for the deed—did you?

A. Well, it was merely a transfer.

Q. You received nothing at all at the time this deed was made out, did you, from your wife?

A. Well, my wife wasn't present at the time it was made. My wife was on Engineer.

Q. Was there any money paid to you, or any valuable consideration given to you, on the 27th of November, as a consideration for this deed?

A. No, there was not at the time.

Q. Mr. Patterson. Your creditors had commenced

to press you considerable about the 27th and a little prior thereto, had they not?

A. As soon as I commenced to take out money, the creditors commenced to press me—this one and then the other—for two or three months.

Q. They had particularly pressed you after the 15th of November, hadn't they, up to the time of the transfer?

A. I don't know as they were any worse then than they were any other time. The cleanups were larger, and of course everyone wanted a little more and a little more. They wanted more than their proportion of what was coming out.

Q. You had issued several checks on your bank account which had been refused prior to the 27th?

A. Prior to the 27th I think there were only two checks. And Mr. Bruning told me that he only held them up until the next week; one check issued to Mr. Peoples and one to Brumbaugh, Hamilton & Kellogg. He told me that he told Peoples that he would have to wait until next week or next cleanup.

Q. Mr. Peoples held a check for a thousand dollars, issued on the 15th of November?

A. I am not sure. I think it was near that date.

Q. Which never was paid, was it?

A. I don't know.

Q. Mr. Patterson. In addition in addition to the title to one-quarter of the Daly Bench which you had on the 27th of November, 1911, you also had a lease upon the whole claim, did you not?

A. Yes. Prior to the 27th of November, 1911, you say?

Q. Yes. On that day you had a lease, didn't you, on the whole claim?

A. I made an assignment of the lease to Mr. Hamilton, and also the deed on that day. I had the lease—(Interrupted)

Q. You made an assignment of the lease that same day?

A. Yes, sir.

Q. To Hamilton?

A. Yes, sir.

Q. And you reserved five per cent as royalty to yourself, did you not?

A. Five per cent to the quarter interest.

Q. You reserved it to yourself, did you not?

A. Well, yes, for that quarter interest.

Q. Mr. Hamilton went ahead and worked the ground under that lease, did he not, paying five per cent into Court in this case under the injunction order?

A. Yes, sir.

Q. And the money is now in this Court?

A. Yes, sir.

Q. In addition to assigning the lease on the Daly Bench to Hamilton on the 27th, and transferring the title to your wife upon the 27th, on the 28th you transferred your lay on the Last Chance Association on Engineer, did you not?

A. Well, I don't know whether it was the 28th, or just exactly what date. There were so many differ-

ent arrangements entered into there at that time. There was applications for a receiver, and an assignment made out for Stocker, and then a receiver appointed. Then, after the receivership was entered, there was an assignment made to twenty-five of the working men to take over the proposition and go ahead and work out this blocked-out ground.

Mr. PRATT.—That is all.

CROSS-EXAMINATION.

By Mr. HEILIG.—Q. Counsel has just asked you in regard to the transfer of the lease to Hamilton that you had received from Wickersham, and the sub-lease which you made to Hamilton. I ask you whether the instrument which I now show you (handing paper to witness) is the writing evidencing that transaction?

A. Yes, sir.

Q. Was it signed by you?

A. Yes, sir.

Q. Was that the lease under which Mr. Hamilton operated?

A. Yes, sir.

Mr. HEILIG.—We offer it in evidence.

Mr. PRATT.—No objection.

(Marked Defendant's Exhibit I.)

DEFENDANT'S EXHIBIT 1.

This indenture of lease made and entered into this 27th day of November, 1911, by and between H. J. Patterson of Fairbanks, Alaska, as party of the first

part, and H. C. Hamilton of the same place as party of the second part, witnesseth:

Whereas by indenture of lease dated October 12, 1911, James Wickersham did lease, let and demise unto the said H. J. Patterson that certain placer mining claim known as the "Daly Bench," situate on the left limit of Ester Creek, second tier, about opposite creek claim number three below discovery on said creek, in the Fairbanks Recording District, Alaska, for the term commencing October 12, 1911, and ending October 12, 1915;

And whereas said James Wickersham has consented to the subletting of said demised premises by the said H. J. Patterson to the said H. C. Hamilton upon the terms and conditions in said lease set forth;

Now therefore this indenture witnesseth that the said H. J. Patterson does hereby lease, demise and sublet unto the said H. C. Hamilton all of the placer mining claim above described, including all his right, title and interest therein held by the said H. J. Patterson as lessee of the said Wickersham and in his own right as owner of an undivided one-fourth part of the title to said mining claim, to have and to hold unto the said H. C. Hamilton for and during the term commencing this day and ending October 12, 1915, upon the same terms, conditions and covenants and subject to the same terms and conditions as in said lease from James Wickersham to said H. J. Patterson set forth, excepting, however, that the said H. C. Hamilton shall pay as royalty and rental as such lessee twenty-five per cent of the gross amount

of each and every cleanup of gold and gold dust made by him upon said demised premises to the said James Wickersham, and shall pay in addition thereto five per cent of the gross amount of each and every cleanup of gold and gold dust made by him upon said premises to the said H. J. Patterson, but in all other respects the terms, covenants and conditions of said lease from Wickersham to Patterson shall be binding upon the said H. C. Hamilton with the same force and effect and to all intents and purposes as if he were a party named as lessee in said lease.

And the said H. C. Hamilton hereby agrees to comply with and perform all the covenants and conditions in this lease contained and as well those contained in said lease from Wickersham to Patterson to the same extent and effect as if they were fully set out and repeated in this indenture, and to that end said lease and the terms, covenants and conditions therein referred to and hereby referred to **and** made a part of this lease.

In witness whereof the parties of the first and second part have hereunto set their hands and seals this 27th day of November, 1911.

H. J. PATTERSON. (Seal.)

H. C. HAMILTON. (Seal.)

In presence of Albert R. Heilig, G. B. Erwin.

District of Alaska,
Fourth Division,--ss.

Before me the undersigned authority personally appeared H. J. Patterson and H. C. Hamilton, each of

whom are personally known by me and known by me to be the individuals described in and who executed foregoing instrument, and each of them duly acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

In testimony whereof I have hereunto set my hand and affixed my official seal at Fairbanks, Alaska, this 27th day of November, 1911.

(Notarial Seal) ALBERT R. HEILIG,
Notary Public, District of Alaska.

I hereby consent to the subletting of the mining ground described in the lease referred to.

JAMES WICKERSHAM,
By HENRY T. RAY, His Atty. in Fact.

Q. This is dated the 27th of November, 1911; but H. J. Patterson party of the first part, to H. C. Hamilton, party of the second part. I ask the witness at this time: This assignment of the lease that you had gotten from Wickersham was made at a time when the legal title to this quarter interest in the Daly Bench was still in your name?

A. It was.

Q. After this transaction, you made the deed to your wife.

A. Practically, pretty nearly. Yes.

Q. Now, then, it reads (reads) "Whereas by indenture of lease dated October 12, 1911, James Wickersham did lease, let and demise unto the said H. J. Patterson that certain placer mining claim

“known as the “Daly Bench” situate on the left limit
“of Ester Creek, second tier, about opposite creek
“claim number three below discovery on said creek,
“in the Fairbanks Recording District, Alaska, for
“the term commencing October 12, 1911, and ending
“October 12, 1915;

“And whereas the said James Wickersham has con-
“sented to the subletting of said demised premises by
“the said H. J. Patterson to the said H. C. Hamil-
“ton upon the terms and conditions in said lease set
“forth;

“Now therefore this indenture witnesseth that the
“said H. J. Patterson does hereby lease, demise and
“sublet unto the said H. C. Hamilton all of the
“placer mining claim above described, including all
“his right, title and interest therein held by the said
“H. J. Patterson as lessee of the said Wickersham
“and in his own right as owner of an undivided one-
“fourth part of the title to said mining claim, to have
“and to hold unto the said H. C. Hamilton for and
“during the term commencing this day and ending
“October 12, 1915, upon the same terms, conditions
“and covenants and subject to the same terms and
“conditions as in said lease from James Wickersham
“to said H. J. Patterson set forth, excepting however
“that the said H. C. Hamilton shall pay as royalty
“and rental as such lessee twenty-five per cent of the
“gross amount of each and every cleanup of gold
“and gold dust made by him upon said demised
“premises to the said James Wickersham and shall
“pay in addition thereto five per cent of the gross

“amount of each and every cleanup of gold and gold dust made by him upon said demised premises to the said H. J. Patterson, but in all other respects the terms, covenants and conditions of said lease from Wickersham to Patterson shall be binding upon the said H. C. Hamilton with the same force and effect and to all intents and purposes as if he were a party named as lessee in said lease.” This five per cent which you refer to in this transfer and lease to Hamilton is what you have testified was the five per cent which was to accrue to the quarter interest in the Daly Bench, the title to which had been made to you by judge Wickersham?

Mr. CLARK.—We object as calling for a legal conclusion; and the instrument speaks for itself.

The COURT.—Overruled. I think it is conceded by the pleadings on both sides.

Mr. CLARK.—I don't think he testified in regard to that. We contend that the lease originally called for 25 per cent and that he assigned 20 per cent—that it called for 30 per cent.

Mr. HEILIG.—You haven't shown any such thing, and the lease is here.

Q. I will now ask you whether the instrument I show you is the original lease which James Wickersham executed to you. (Exhibiting same to witness)

A. Yes sir.

Q. The sheet attached to the original lease purporting to be signed; “James Wickersham by Henry “T. Ray, his attorney in fact,” do you know who at-

tached that and who executed it. (Handing same to witness)

A. Yes, sir.

Q. Who was it?

A. Henry T. Ray.

Q. He was the attorney in fact of James Wickersham?

A. Yes sir.

Mr. HEILIG.—We offer this in evidence.

Mr. PRATT.—No objection.

(Marked as Defendants Exhibit 2)

Mr. HEILIG.—We want to call the Court's attention to the fact, at this time, that this is a lease dated the 12th of October, 1911, made by judge Wickersham to H. J. Patterson (reads) "Witnesseth: "That the party of the first part"—That is James Wickersham—"is the owner of an undivided three-fourths interest in, and the party of the second "part" —that is H. J. Patterson—"is the owner of an "undivided one-quarter interest in, that certain placer "mining claim known as the "Daly Bench" situated on the left limit of Ester Creek." Then he leases the whole of the premises to Patterson upon a royalty of twenty five per cent to judge Wickersham, which was, as shown by the attached instrument, signed by James Wickersham through his attorney in fact Henry T. Ray. Will you admit that Henry T. Ray is his attorney in fact?

Mr. CLARK.—Yes, we admit it.

Mr. HEILIG.—You admit that Henry T. Ray was

at that time attorney in fact, with power to execute such instrument?

Mr. PRATT.—Surely.

Mr. HEILIG.—That subsequently Mr. Wickersham, by his attorney in fact reduced that twenty-five per cent royalty to twenty per cent to Mr. Wickersham, and the five per cent, which was provided for in this transfer to sublease which Mr. Patterson made to Hamilton, was never reduced.

Q. Mr. Patterson. You had an agreement with Judge Wickersham—a lease from him—prior to this instrument dated the 12th of October, 1911?

Mr. PRATT.—We object—(Interrupted)

A. Yes sir.

Mr. PRATT. —for the reason that it is not proper cross-examination and incompetent. (Argument) It is part of their defence.

The COURT.—I think they have a right to go into the full transaction on cross examination. You inquired in regard to the consideration for this transfer, and they have a right to go back of it to show what the consideration was.

Mr. HEILIG.—Q. I believe you stated that you had a prior agreement and lease from judge Wickersham made on the 19th of September 1910.

A. I did.

Q. I will ask you whether that (Producing paper) is the instrument, signed by you and judge Wickersham.

A. Yes sir.

Mr. HEILIG.—I offer it in evidence.

Mr. PRATT.—We object, for the same reasons assigned a while ago, as not cross-examination, and as part of their own case.

The COURT.—Objection overruled. (Plaintiff excepts)

(Marked Defendants' Exhibit 3)

Mr. HEILIG.—This is the instrument I referred to “as “the first agreement” entered into. It is an agreement and a lease, dated the 19th of September, 1910, (reads) “By and between James Wickersham, “of Fairbanks, Alaska, party of the first part, and H. “J. Patterson, of Ester Creek, Fairbanks Precinct, “Alaska, party of the second part, witnesseth: That “the party of the first part”—that is James Wickersham—“is the owner and in possession of that “certain placer mining claim known as the ‘Daly “Bench’ situate on the left limit of Ester Creek in “the second tier of benches and about opposite Nos. “2 and 3 below Discovery on the said left limit of “said Ester Creek, Fairbanks Precinct, Territory of “Alaska, and the party of the second part desires to “prospect thereof and to take a lease for the future “working thereof; in consideration of the sinking “of a hole from the surface to bedrock thereon for “the purpose of prospecting the said ground and determine its value by the party of the second part at “his own expense, the party of the first part does “hereby agree to make, sign and deliver to the party “of the second part a quitclaim deed to an undivided one-fourth interest in the said premises; “the party of the second part undertakes hereby,

“in consideration of said agreement and transfer to
“sink said hole upon the said premises and to
“do the assessment work for the year 1910 without
“any expense whatever to the party of the first
“part;” That is the agreement relating to the transfer
of the one-quarter interest, and expresses the con-
sideration. Then follows: (reads) “In further con-
sideration of the rents, royalties, covenants and
“agreements hereinafter reserved and by the said
“party of the second part to be kept, paid, and per-
“formed, the party of the first part does hereby grant,
“demise, let and lease unto the said party of the
“second part the whole of the said premises to-
“gether with the appurtenances”—and so on, and then
the customary terms of a mining lease.

Q. Mr. Patterson. Under this instrument which I
have just referred to, did you, as a layman, com-
mence mining operations on the Daly Bench?

A. No sir.

Q. I call your attention to the fact that this in-
strument requires you as a lessee of those premises
to work steadily and continuously. —(Interrupted)

Mr. CLARK.—We want it understood that our ob-
jection goes to the entire amount of this class of
testimony.

The COURT.—Yes. I understand.

Mr. HEILIG.—Q. To work steadily and con-
tinuously in mining on that ground. And I ask you,
in view of the fact that you have stated that you
did not do that, what was the result of your failure
to perform the terms of your lease, or, rather, what

action did judge Wickersham take in view of the fact that you had failed to perform it?

A. He forfeited the lease.

Q. You assented to that? You admitted that you had failed to comply with the terms of the lease?

A. Yes. And I lost possession of the ground.

Q. Then, as I understand, Judge Wickersham made—Let me ask you: Did Judge Wickersham recognize that the consideration for the transfer of the quarter interest referred to in this agreement had been performed?

Mr. CLARK.—We object as calling for a conclusion of the witness.

Mr. HEILIG.—Q. I will ask this witness to state what judge Wickersham said in regard to your right to the transfer of the quarter interest.

Mr. CLARK.—We object as hearsay.

The COURT.—He may answer, subject to the objection.

A. Wickersham agreed to make a deed to the quarter interest. But, so far as continuing the lay, he would not do it, because conditions had changed, and, before I could get a new lease from Wickersham, I had to assume a lot of extra heavy duties that didn't occur in the first lease. But, if I wanted to drop the lease altogether, he offered to deed to me the quarter interest.

Q. (By Mr. Heilig) I will ask you whether you recollect any statement on his part, that he admitted that you had performed the conditions of the transfer.

Mr. CLARK.—We object as hearsay and leading.

The COURT.—Do you (to Mr. Clark) contend that he had not?

Mr. HEILIG.—They are basing their title on that very fact.

The COURT.—Objection overruled.

A. At the time we surveyed the ground during—When Wickersham came in here, I took Wickersham to the ground and showed him the drill holes and showed him the bedrock that had been dumped out, and he was satisfied that those holes went to bedrock.

Mr. HEILIG.—Q. Who caused those holes to bedrock to be sunk?

Mr. PRATT.—We object as—(Interrupted)

A.—Mrs. Patterson.

Mr. PRATT.— —immaterial, not proper cross-examination.

The COURT.—Overruled (Plaintiff excepts. Allowed)

Mr. HEILIG.—It goes directly to the question of consideration.

Mr. PRATT.—It is part of their case.

Mr. CLARK.—We are not going into that consideration. We are going into the consideration of the deed from himself to his wife.

The COURT.—I think, when you went into the question of consideration, that it opened up the entire consideration.

Mr. CLARK.—This is the consideration moving from him to Wickersham for the previous transfer.

The only consideration we went into was whether or not on the 27th of November, 1911, any consideration passed from Mrs. Patterson to himself for this transfer.

The COURT.—I think it has a bearing on the consideration of the second transfer. If it has not, it is immaterial.

Then Mr. CLARK.—We except.

Mr. HEILIG.—Q. Your answer to my question was that Mrs. Patterson caused those holes to be sunk to bedrock.

A.—She did.

Q. She was the one, was she not, that caused the assessment work to be done for 1910 on the Daly Bench?

Mr. CLARK.—We object as leading (Sustained)

Mr. HEILIG.—Q. At whose expense were the drill holes sunk to bedrock in 1910?

A. Mrs. Patterson.

Q. Mariam A. Patterson, the defendant here?

A. Yes sir.

Q. I will ask you how many drill holes were sunk at her expense.

A. Two.

Q. And whether that was the performance, which you and judge Wickersham agreed upon, of the requirement of this agreement that a hole should be sunk to bedrock and the assessment work for 1910 should be done on that claim at your expense.

A. It was.

Q. Where did Mrs. Patterson get the money with

which she paid for sinking those holes?

A. It was in payment of a note which Mr. Hosler, my old mining partner in the Dawson country, and I, gave to her several years before we finished mining operations upon Ready Bullion. We had our settlement between ourselves as partners, then we paid this note to Mrs. Patterson.

Q. What is Mr. Hosler's given name?

A. Delbert G. Hosler.

Q. How did you and Mrs. Patterson generally refer to him?

A. As "Del" We always called him Del.

Q. Do you know how he signs his name generally?

A. Delbert G. Hosler.

Q. Always?

A. D. G. Hosler.

Q. You say you and Mr. Hosler gave Mrs. Patterson a note for money which you owed her?

A. Yes sir.

Q. I show you a writing and ask you if that is the instrument you refer to (Handing paper to witness)

A. Yes sir.

Q. Was that signed by you and Hosler?

A. Yes sir.

Q. And delivered to Mrs. Patterson at the time it bears date?

A. Yes sir.

Mr. PRATT.—We object as immaterial, and not proper cross-examination.

Mr. CLARK.—It is a matter of defence.

The COURT.—Objection overruled. It is a matter that could be introduced in defence, but I think it is proper cross-examination. (Marked Defendants Exhibit 4)

(Plaintiff excepts. Exception allowed)

Mr. HEILIG.—(Reads Exhibit 4)

“\$500.00 Dawson, Y. T. Oct 19 1905.

“Nine months after date, we promise to pay to Mrs. “H. J. Patterson Five hundred and 00-100 dollars. “Value received, at the rate of 2 per cent per month.

“Due July 19 1906. H. J. PATTERSON
D. G. HOSLER.”

Q. You say that at the time you gave her that note, it was for five hundred dollars which you had received from her as a loan.

A. Yes sir.

Q. You and Mr. Hosler.

A. Yes sir.

Q. And the five hundred dollars, she had received as part of the output of a mining claim which she owned.

A. Yes sir.

Q. In Dawson. What was the number or name of that claim?

A. It was a fraction between 45 and 46 below Discovery on Bonanza Creek.

Q. Can you state approximately how much money she realized from that claim, as royalty?

Mr. CLARK.—We object as immaterial, and it is not cross-examination. (Objection sustained)

Mr. HEILIG.—Q. After you had made this agreement with Mr. Wickersham that if you would sink a hole to bedrock and do the assessment work for 1910 he would convey to you a quarter interest, and you agreed to do it, what steps did you take to carry out the performance of your part of the agreement?

Mr. CLARK.—We object as already having been gone into. He testified he sunk two holes to bedrock.

Mr. HEILIG.—I am asking what steps he took to procure the performance of that agreement.

Mr. CLARK.—It is immaterial what steps he took. It is the ultimate fact that is material.

Mr. HEILIG.—We want to show that he went to Mrs. Patterson and stated the condition of facts to her and made an agreement with her that she should perform this contract, and that she should have the title to the property.

The COURT.—The objection is overruled.

(Plaintiff excepts. Exception allowed)

Mr. HEILIG.—I will ask you now: After you made this agreement with judge Wickersham, what steps did you take to bring about the performance of that part of the contract?

A. My first agreement with judge Wickersham was simply a verbal agreement. I came in and we talked the matter over, and he told me what he would do; he would give me a seventy five per cent lease and a quarter interest for sinking a drill holes and representation work.

Mr. CLARK.—That is not responsive.

A. (continuing) Then, after that conversation, we agreed to it then, and he said; "I will have those papers made out". And I went right out home, and, when I got home, I told Mrs. Patterson the agreement and proposition I had with judge Wickersham and told her that if she would sink the drill holes, or pay for the sinking of the drill holes, that she could have the quarter interest; that I would need the money. I had for operating the mine. And she consented to that. And I immediately went down and made the contract with the drill men to do it, and told Mr. Craig at the time—(Int—)

Mr. CLARK.—We object to what he told Mr. Craig as a self serving declaration.

The COURT.—That would be self serving.

Mr. CLARK.—We withdraw our objection.

Mr. HEILIG.—Q. You told Mr. Craig— Who was Mr. Craig?

A. Mr. Craig was the man actually in charge of the drill. There was Craig, Lee and Estby, I think were the partners in the drill, but Craig was looking after the business part of it. And I told him at the time that I had a lease and a quarter interest on the claim for sinking the drill holes, and that Mrs. Patterson was to pay for those holes and she was to have the quarter interest, and, if we found anything, that I would go ahead and open up the ground. That is as near as I can remember it. It was a long time ago.

Q. Now Mr. Craig went ahead—(Interrupted)

A. Mr. Craig moved the drill right up, and I came

on into town, as Mr. Wickersham was in a very big hurry to get his business settled up so he could get out, and we signed up the papers. And when I came back, I went up, took Mr. Craig up on the claim and showed him where to put the first hole—

Q. You signed up what you call the agreement dated the 19th of September, 1910?

A. Yes. And when I came back, he was down to bedrock in that first hole. He didn't find anything. and Mr. Craig had had a good deal of experience in drilling claims on the creek up above, and we were talking about it and he suggested futher over would be a better chance, and we went over to the left of the claim and started another hole, and that was put down 125 feet. The first one was 100 feet and the second one was 125 feet. . They charged a dollar a foot.

Q. Did you find anything in the second hole?

A. Just a few colors, a very few, small and fine.

Q. How much was the charge for those services?

A. Two hundred and twenty five dollars.

Q. Who paid for it?

Mr. PRATT.—We object to that—(Int—)

A. Mrs. Patterson.

Mr. PRATT.—(Continuing) —because it is not shown that he knows, or how he knows.

Mr. HEILIG.—Q. How did she pay for it?

A. By check.

Q. I show you a paper now, and ask you whether that is the check with which Mrs. Patterson paid Mr.

Craig for that work. (Hands same to witness)

A. Yes sir.

Q. Did you see that check before it was delivered to Mr. Craig?

A. Yes sir.

Q. You saw Mr. Craig take the check?

A. Yes sir.

Q. You are familiar with Mrs. Patterson's signature?

A. Yes sir.

Q. Did you see her sign the check?

A. Yes sir.

Mr. HEILIG.—We offer it in evidence.

Mr. CLARK.—Same objection; not cross-examination.

(Objection overruled. Plaintiff excepts; allowed)

(Marked Defendants Exhibit 5)

Mr. HEILIG.—(reads) "Fairbanks, Alaska, Sept. '21, 1910. Washington-Alaska Bank. Pay to the 'order of Fred Craig \$225.00 Two Hundred, Twenty 'five 00-100 dollars. Mariam A. Patterson." Indorsed with the name of Fred Craig. Also indorsed; "Fairbanks Banking Go". It is drawn on the Washington-Alaska Bank with perforations reading: "Paid 9-23-10".

Q. You say that after that work of sinking those two holes was done and this money paid, you came to town to see judge Wickersham.

A. Yes sir.

Q. How soon did you do that?

A. I think it was probably the next day. Not more

than two days I don't think.

Q. Did you find the judge in town?

A. No. I met you on the corner down here and told you that I had put the holes down, and you said judge Wickersham had gone and you might possibly catch him at Gibbon, by wire.

Q. Then what did you do in regard to securing a conveyance of the quarter interest to you or to Mrs. Patterson?

A. When the papers was made out, I asked judge Wickersham—(Int)

Q. Just a minute. What I want to direct your attention to: Did you do something while the judge was away, in regard to—(Int)

A. No, only the man that he left in charge of his business before the judge went away was Henry Roden, and he went down below.

Q. Where?

A. Here.

Q. Went below where?

A. Down to Iditarod.

Q. Did you do anything in regard to securing a conveyance of that quarter interest, before Wickersham got back again from Washington?

A. No.

Q. For the purpose of the record, can you state what Mr. Wickersham's business at Washington was?

A. He was Delegate from Alaska.

Q. Now, after judge Wickersham returned, just state what you did in regard to securing this conveyance; what you said to him, and in regard to

securing this new lease?

Mr. CLARK.—We object for the same reasons; immaterial and not cross-examination.

The COURT.—Overruled (Plaintiff excepts. Exception allowed)

A. Well, of course, I had made—We had lost possession of the ground at that time, and Wickersham, when he came in, we were talking it over, and he was scolding me soundly for neglect in not going ahead with the lease and keeping possession of the ground, and insisted that I pay the expense of recovering the ground before I could get a new lease.

Q. The Daly Bench had been jumped during that time?

A. Yes sir.

Q. By whom?

A. By the Happy Home people.

Q. Those were the Happy Home people that counsel referred to in his examination in chief?—

A. Yes.

Q. —when he spoke to you about them having found the pay channel.

A. Yes sir.

Q. And the owners of the Happy Home—(Interrupted)

A. Had overlapped the Daly Bench entirely.

Q. —they were claiming the Daly Bench as part of the Happy Home location?

A. Yes sir.

Q. That contention was well known among the public, wasn't it?

A. Yes sir.

Q. There was considerable contention over the question, and threatened litigation?

A. Yes, indeed, very high feeling.

Q. I believe you stated in your direct examination that that dispute was compromised.

A. It was.

Q. How was it finally compromised?

Mr. PRATT.—We object to this. This doesn't seem to be showing the original consideration for this quarter interest. He is getting beyond the scope of his alleged proof.

The COURT.—What time do you refer to now?

Mr. HEILIG.—Just shortly before this deed was made to his wife.

The COURT.—Objection overruled. (Plaintiff excepts; allowed)

Mr. HEILIG.—Q. When was that dispute with the Happy Home people adjusted?

A. It was adjusted I think the morning that the deed was made out—that was recorded.

Q. Recorded?

A. Yes. I think our meeting was in the morning, and in the afternoon Wickersham and I went over to the recording office and recorded all the papers.

Mr. HEILIG.—Will counsel agree that on November 10, 1911, the compromise with the Happy Home people—(Interrupted)

Mr. PRATT.—I will furnish a copy of the agreement and the deeds, and you can put it in evidence (Hands same to Mr. Heilig)

Mr. HEILIG.—Q. So, on November 10, 1911, they finally settled the dispute with the Happy Home people.

A. Yes sir.

Q. By giving them how much of the Daly Bench?

A. Seventy five—(Interrupted)

Mr. PRATT.—I object as not the best evidence.

The COURT.—If you want to limit your question to when it was settled, you may do so; if you want to go further, I think the instrument itself should be introduced.

Mr. PRATT.—It is a conclusion as to the settlement, anyway.

The COURT.—That may be, too.

Mr. HEILIG.—Q. This deed from judge Wickersham to you; when was that delivered to you?

A. It was delivered on the date of the compromise.

Q. November 10, 1911?

A. Yes.

Q. It bore date the 14th of October, and was acknowledged on that date. I will ask you to state what caused the delay in the delivery of the deed, after the judge had signed it?

A. It was the probable litigation over the title to the Daly Bench.

Q. Were you present at the time Mr. Wickersham signed this deed, or did you speak to him about making the deed before he signed it?

A. Yes sir.

Q. What did you state to him in regard to the

person to whom the deed should be made?

Mr. CLARK.—We object as immaterial, not cross-examination, and self serving.

The COURT.—Overruled. (Plaintiff excepts. Allowed)

A. I asked judge Wickersham to make the deed to Mrs. Patterson.

Mr. HEILIG.—Q. Did you state to him any reason why it should be made to Mrs. Patterson?

A. Yes. Because she paid for the sinking of the drill holes. Judge Wickersham says: "I will not be "here. And I don't want to do any business with "anybody else but you, and" he says "it always hinders and balls things up to—(Interrupted)

Q. What did he say about—(Interrupted)

A. He says: "You can transfer the deed to any—"one you like".

Q. Instead of going to work as a layman under your first lease on the Daly Bench, where did you go to mining?

A. I went into a lease with Charles Tolbert on the Tolbert Bench first tier, a bench opposite 4 below Ester Creek, left limit, directly below, between the Daly Bench and the creek.

Q. How soon after these holes had been sunk to bedrock on the Daly Bench that Craig sank?

A. I think I have a time book here (produces book). No I have not the right time book here. It was a week, possibly two weeks, something like that.

Q. I believe you stated that previous to that time you had been working on Ready Bullion.

A. Yes sir. I was with the Ready Bullion Mining Company.

Q. I will ask you to state whether that was profitable.

A. Yes sir. It was.

Q. So that, at the time these holes were sunk for which Mrs. Patterson paid, you had money?

A. Yes sir.

Q. And that money you used in your work on the Tolbert Bench.

A. Yes sir.

Q. How long did you continue mining there?

A. I mined there about six weeks. It was a wet shaft, and it took six weeks to put the shaft to bed-rock and drift twenty or thirty feet.

Q. You had had considerable experience in working what is known as wet ground.

A. Yes sir, about eight or ten years experience in it.

Q. That fact was pretty generally known in this community.

A. Yes sir.

Mr. CLARK.—We object, as irrelevant, incompetent and immaterial.

Mr. HEILIG.—Q. Now, then, as a result of that experience, just state how you came to operate on Last Chance claim on Engineer?

Mr. PRATT.—We object to that as immaterial.

(Mr. Heilig states the purpose of the testimony, but the objection is sustained)

Mr. HEILIG.—Q. Where did you dispose of the cleanups that you made on the Last Chance claim?

A. At the American Bank.

Q. You mean the American Bank of Alaska?

A. The American Bank of Alaska, yes.

Q. On what bank did you draw checks in payment for supplies and labor?

A. On the American Bank of Alaska.

Q. Now, counsel has asked you whether you transferred this lay that you had on the Last Chance claim. What lay was that?

A. That was—(Interrupted)

Q. State where and how you got that lay.

Mr. PRATT.—We object as immaterial. (Argument)

Mr. HEILIG.—Q. Counsel has asked you whether you didn't transfer your lay on Last Chance claim just about the end of November. Can you state to the Court what the transactions were with reference to that lay, and your mining operations about that time on that lay?

Mr. PRATT.—We showed that simply for the purpose of showing that it was practically worthless. We didn't put that in to show any fraud in transferring that particular lease on the Last Chance.

Mr. HEILIG.—Will you admit that that lay was transferred to the creditors for their benefit?

Mr. PRATT.—Yes. And we will also admit that they didn't get anything out of it, except some of the laborers got twenty six per cent.

The COURT.—I do not see that that has any bearing on this case.

Mr. HEILIG.—Q. Counsel has called attention to

the fact that in the deed that you made to Mrs. Patterson on the 27th of November, 1911, the consideration is stated to be one dollar. I will ask you whether that was the true consideration.

Mr. CLARK.—We object as he has already gone into that question of consideration.

The COURT.—Overruled.

(Plaintiff excepts. Exception allowed)

A. No, I didn't consider that the true consideration. I thought it was simply a matter of form.

Mr. HEILIG.—Q. When you executed this deed to Mrs. Patterson, why did you make her a deed to the property?

A. Because she was entitled to it.

Q. Why was she entitled to it?

A. Because she had performed that part of the agreement.

Q. That is—(Interrupted)

A. The conditions of that Wickersham agreement.

Q. The agreement between you and her?

A. Yes sir, and the conditions of the Wickersham agreement.

Mr. HEILIG.—That is all.

(Trial continued until Saturday, September 27th, 1913, at 11 o'clock A. M.)

Saturday, September 27, 1913, 11 A. M. Trial resumed.

H. J. PATTERSON, resumes his testimony, as follows:

REDIRECT EXAMINATION.

Mr. PRATT.—Q. Where do you claim Mrs. Patterson got the \$500.00 for which you say the Hosler note was given?

A. It was royalty from a fraction between 45 and 46 below Discovery on Bonanza Creek in the Dawson country.

Q. Royalty?

A. Yes. She staked the claim herself.

Q. She staked it herself?

A. Yes.

Q. You were there telling her how to do it. were you?

A. I assisted her. Yes.

Q. You had operated there, had you, in the Yukon country—Yukon Territory?

A. Yes sir.

Q. And you had gone broke up there, hadn't you?

A. I had in one instance. Yes.

Q. And all that you left there with was this claim in her name. Isn't that true?

A. No. She didn't have the claim at that time. She had disposed of it to Treadgold before that.

Q. She had already disposed of it?

A. Yes sir.

Q. Sold it outright?

A. Yes sir.

Q. When was it you left there?

A. I left there the fall of 1907.

Q. Who was working this claim when the royalties were paid into her?

A. My partner, Mr. Hosler.

Q. And you?

A. I was a partner with him there at that time. I was foreman for the N. A. T. Company on 79 below on Bonanza, and Mr. Hosler took charge of this work, carried it through until sometime in September.

Q. What was the \$500.00 used for by you and Mr. Hosler?

A. We were interested in claims on the left limit, bench claims, with Hiram McIntosh. And when we bought into these claims, the parties on top of the hill were pumping water up and hydraulicking, and we had given them dumping privileges for the use of the water. The next spring they removed their plant to another place, and their tailings and everything, and we were without water. We had put our money into it, but we had nothing but sniping really there.

Q. Were you not a half owner with your wife in that fraction?

A. No. No.

Q. You owned absolutely nothing in it?

A. Nothing in it whatever.

Q. You had no interest in the royalties?

A. No sir. None.

Q. Or the selling price of it?

A. No sir. I was working for the N. A. T. Company.

Q. And she kept the royalties and the selling price after she got down here into Fairbanks?

A. No. She went outside in 1906.

Q. And you went with her, didn't you?

A. I did.

Q. And the two of you spent that money.

A. No. Not all of it.

Q. You helped her spend it, didn't you?

A. I went out with her. Yes.

Q. Isn't it a fact that you considered that your money?

A. No. I never did. I had a chance to work for the "Guggs" but she insisted upon me going, as she didn't want to go alone.

Q. Didn't she stake that claim for your benefit?

A. No sir.

Q. You went out in 1906, and when did you come back?

A. I came back in February, 1907.

Q. Where did you come to?

A. To Dawson.

Q. Did you mine up there again?

A. No. I went to work for the Guggs, for the Yukon Gold Company.

Q. Did you do any independent mining up there?

A. No, nothing but to represent the bench claims.

Q. When did you come to the Fairbanks Precinct?

A. I think it was about the first of October, 1907.

Q. And you commenced mining here, didn't you?

A. No. I went to work for wages. When I came—I did do a little mining out here on Ester Creek, took an option on a piece of ground.

Q. When was that?

A. That was in October—November, I believe,

1904, on 4 below.

Q. Did you make any money on that?

A. No.

Q. You went broke again?

A. I went a little behind, but I paid that up.

Q. How much money did you have to put into that lay?

A. There?

Q. Yes, to start it out?

A. I think it was about \$150 or \$200. Mr. Heimburger and I were together on the proposition. It was simply an option on the ground, testing the ground. It was only a question of testing the ground, as Mr. Heimburger and judge Erwin offered to back up the proposition. I was simply testing the ground for them.

Q. How much did you go behind on that proposition?

A. About \$400.

Q. Is that all?

A. Yes.

Q. Did you ever get that paid?

A. Yes sir.

Q. When?

A. When I finished mining on Ready Bullion. I gave a note to the Ester Mercantile Company, and I paid that.

Q. That was in 1907, wasn't it?

A. That mining was in 1907, but it was 1910 that I paid the note.

Q. What did you do after you quit mining in 1907?

A. Well, I went into a mining deal with judge Erwin and Heimbürger and Billy Atchison.

Q. Where was that?

A. On the **right** limit bench, directly upstream from this.

Q. How did you come out on that?

A. We came out quite a ways behind.

Q. Behind again?

A. Yes.

Q. What did you do after that?

A. I took a lay on Bigelow's Fraction 8 A below on Ester Creek.

Q. What year was that, and what time of the year?

A. I think it was sometime in 1909 or 1908. Let me see.

Q. Fall of 1908?

A. Spring of 1909.

Q. How did you come out on that?

A. I just made wages. I made just about wages on that.

Q. Didn't you go broke on that?

A. No.

Q. Didn't you?

A. Just about pulled even on that proposition.

Q. When you got through, you had not paid in all your royalty, had you?

A. I paid all of the royalties.

Q. Mr. Bigelow, the owner of that claim, claimed that you were behind in the royalties, did he not?

A. Yes. But that was a very much disputed propo-

sition, what Bigelow claimed.

Q. How much did he claim you were behind?

A. The only thing Bigelow claimed was some rental on machinery. There were two cleanups towards the last on which there was no royalties paid on it, but that was by agreement by Mr. Bigelow between Heimburger and I.

Q. Mr. Bigelow wouldn't agree that that royalty should be taken, afterwards, didn't he? Didn't he claim that it was still due him?

A. No. I will have to explain the proposition.

Mr. HEILIG—They are going into matters that are immaterial.

The COURT.—This is a collateral matter, it seems to me. The objection will be sustained. (Plaintiff excepts)

Mr. PRATT.—Q. When did you get through with the lay on Bigelow's ground?

A. I think it was September, 1909.

Q. Did you owe any wages to the men?

A. I paid all the wages.

Q. Every single one?

A. Yes.

Q. Did you do any more mining on Ester that year?

A. Not on Ester.

Q. You are sure you paid all the wages?

A. There was—(Interrupted)

Mr. HEILIG.—I don't see that this is material.

A. I have receipts for all the wages.

Mr. HEILIG.—All right. Let it go at that.

Mr. PRATT.—Q. What does it mean in your petition in bankruptcy where the list of creditors claims are included; James Dolan Residence, Iditarod, Alaska, Wages earned on Ester Creek in 1909, \$200?

Mr. HEILIG.—They are cross-examining their own witness on immaterial matters, and they cannot impeach their own witness on immaterial matters even if they were trying to do it independently, but they are trying to do it on cross-examination.

Mr. PRATT.—It shows this man was broke all this time. He was living all this time and his wife had money all this time. It has a tendency to show there was some secret arrangement between himself and his wife even then.

WITNESS.—Mr. Dolan didn't work on that ground at all. I paid all the wages that were on that.

Mr. PRATT.—I will show right now that he didn't pay all the wages, by his own statement in writing.

The COURT.—This proposition having been called up by you, I do not think that you are entitled to impeach him by that kind of testimony. You may show other statements he made at other times.

Mr. PRATT.—This is another statement he made at another time, and I ask him to explain it.

The COURT.—He has explained it.

WITNESS.—Mr. Dolan didn't work down there.

Mr. PRATT.—Where did he work?

A. He worked—(Interrupted)

Mr. HEILIG.—We object to that—

The COURT.—Objection sustained. (Plaintiff excepts)

Mr. PRATT.—Q. When did you get through with that lay on the Bigelow ground?

A. I don't know the exact date, but it was sometime in the fall of 1909.

Q. What did you do the rest of that year?

A. Mr. Heimbürger and I went up on No. 6 Ready Bullion, with Mr. Atchison and Charley Patton.

Q. Up to that time you had done nothing except mine in the Fairbanks Precinct, had you?

A. Mined, and worked for wages some.

Q. When did you work for wages?

A. On Dome, when I first came down here, the first winter I came down.

Q. How long did you work for wages?

A. Two or three months.

Q. That is all the work you did, except mining, up to the time you took the lay on Ready Bullion?

A. I think so.

Q. And you had gone broke on each separate mining venture, had you not?

A. I didn't make anything on the Bigelow ground, but I didn't lose anything.

Q. You had gone broke on all the others, hadn't you?

A. Yes.

Q. What were you living on during all of that time?

A. I was living on credit.

Q. What?

A. I lived on credit.

Q. Your wife had money all that time, hadn't she?

A. No, not in here. My wife wasn't in here.

Q. She had money outside, hadn't she?

A. She had very little money. What she had, she had her's. It was her own. I sent her what money I could.

Q. Now, you went to work on your lay on Ready Bullion in the spring on 1910, did you?

A. No, it was the winter of 1910; the fall of 1909 and the winter of 1910. This lay that I speak of on Number 6 is a prospecting proposition that Heimburger and Patton and Atchison and I entered into. But the Iditarod stampede came up, and we called that off. We just started to finish a bedrock drain that McQuarie and Jones had started. We intended to open up and work, but we didn't do very much.

Q. What did you do after that?

A. I went then into the Ready Bullion Mining Company with with Hosler and Clark and Gardner.

Q. When did you start that?

A. I think it was in the latter part of October or in November, 1909.

Q. How long did you work at it?

A. Until sometime in June, I believe, 1910.

Q. You made a little money there, did you?

A. Yes. We paid up \$15,000 of McGregor's old indebtedness, besides making a pretty good profit.

Q. Then you say you and Hosler paid this note to Mrs. Patterson.

A. Yes.

Q: When was that paid?

A. I don't know the exact date, but it was after the settlement, sometime during the summer there after the settlement between Hosler and I and the Ready Bullion Mining Company.

Q. Where is Hosler now?

A. Hosler is in the Hot Springs.

Q. He paid his part separately, did he?

A. Yes sir.

Q. Did he pay it direct to Mrs. Patterson?

A. He did. We were all in the cabin together and made the settlement.

Q. Did you pay yours at the same time?

A. No. I deposited \$300.00 for her in the Washington-Alaska Bank.

Q. How long after Hosler paid his share?

A. Well, it was some few days; the next tript to town.

Mr. HEILIG.—Wait—

Mr. PRATT.—Q. Was the note delivered to Hosler when he paid his share?

A. Yes.

Q. It was delivered to Hosler?

A. Yes.

Q. Why wasn't it marked "paid"?

A. I don't know. We got up and went away, and probably overlooked it. He didn't take it with him—Something of that kind.

Q. When did you get this from Hosler?

A. What?

Q. This note?

A. It was left at our house.

Q. I thought you said that the note was delivered to Hosler when he paid?

A. It was right there. The settlement was in our cabin, and in some way in taking his papers home the thing was left there somehow. I don't know. I noticed it afterwards, and put it away with the papers.

Q. You noticed there was no mark of anything on it?—

A. I didn't pay any attention to that.

Q. —showing it had been paid?

A. I didn't pay any attention to that.

Q. Did Hosler ever inquire into the note after that?

A. No. I wrote to Mr. Hosler when this case came up, and wanted him to come as a witness. He wired me that he had hard luck this summer, and that they were moving and building a cabin, and he said it would be dreadful for him to come now, and he wanted to know if I couldn't take his deposition.

Q. You made no attempt to take his deposition?

A. After Mr. Heilig thought that they wouldn't need his deposition

Q. When was it you first made the arrangement with Mr. Wickersham to sink a hole to bedrock on the Daly Bench and get a quarter interest?

A. Well, I don't know as I could give just exactly the date, but it was just a very few days before the work was done. I came to town and I asked judge Wickersham for a half interest in the Daly Bench for

sinking a hole to bedrock. The judge says: "I will "give you a quarter interest and a seventy five per "cent lease on the whole of the claim".

Q. Didn't that take place in August, in the latter part of August?

A. Just before the judge went out. He was packing up and was very anxious to get away. He only had two or three days, I think it was, in which to get out. So, after we agreed on the proposition, he went into his stenographer and told him what he wanted made out. I went out home that evening.

Q. The agreement is dated the 19th of September, 1910. How many days before that was it you had the conversation with Mr. Wickersham?

A. I think it was the day before, or possibly two days before; not more than two days before, I don't think.

Q. And you went right out after the conversation?

A. That is the best of my recollection.

Q. And you talked it over with you wife then and told her if she would furnish the money she could have the quarter interest?

A. Yes.

Q. Did you tell her that you would convey it to her?

A. I told Mrs. Patterson that if she would pay for sinking the drill holes, she could have the quarter interest.

Q. Did you say you would have Wickersham make her a deed?

A. I didn't refer to that.

Q. Or did you say you would give her the quarter?

A. I don't remember that.

Q. You came right back to town then and got this agreement, did you?

A. No. I went down and made the contract with the drill men, and took Mr. Craig up and showed him where to put the hole, where I thought would be the best chance.

Q. Did you say anything to Mr. Craig about Mrs. Patterson having an agreement with Wickersham to get a quarter interest?

A. I did. I says; "Your money is ready for you whenever the work is finished. Mrs. Patterson is to have the quarter interest. I have a lease and a quarter interest for putting—a quarter interest for putting the drill holes down, and a lease on all the ground".

Q. You said you had.

A. I says; "Mrs. Patterson will have the quarter interest for paying for the drill holes".

Q. You are sure you told him that?

A. Yes, I am sure that I told him practically that. I couldn't give the exact words, it is so long ago that I can't remember exact words, but it is just as near as I can remember that is the conversation.

Q. Isn't it a fact that you told Mr. Craig that you were to get a quarter interest. And that he then said; "Well, I can't work for you unless you pay me cash." And you said: "Well, Mrs. Patterson will have a check for you."

A. No.

Q. That is not it?

A. No.

Q. You testified in your examination here that Mrs. Patterson caused these holes to be sunk to bed-rock.

A. Well, as soon as she agreed to sink the holes, to pay for the sinking of the holes, I went and made the deal with the drill men to complete that contract.

Q. You testified before the referee in bankruptcy at the first meeting of the creditors?

A. I believe I did.

Q. Didn't you say something like this: You were asked; "Q. Did you sink the hole"? referring to the hole on the Daly Bench, And you answered; "A. I "caused it to be sunk." Didn't you make that answer before the referee?

A. Well, something—I made an answer something of that kind. I couldn't say just exactly the words.

Q. You didn't say anything about Mrs. Patterson causing it to be sunk, did you?

A. I don't remember now.

Q. Your agreement with Wickersham was a personal agreement between you and him, wasn't it, that you were to have the interest?

Mr. HEILIG.—Which agreement do you refer to; the written agreement?

Mr. PRATT.—The oral agreement now.

A. Yes sir.

Q. You didn't say anything about Mrs. Patterson to him, did you?

A. Not the first agreement.

Q. After you saw Craig, you then came back to Fairbanks again, did you?

A. Yes sir.

Q. And got the written agreement.

A. Yes.

Q. Did you tell Mr. Wickersham then that Mrs. Patterson was to have the quarter interest?

A. I asked Mr. Wickersham if the deed couldn't be made out to Mrs. Patterson; that she was paying for the drill holes, and Mr. Wickersham says; "I don't want— I will not be here, and I don't want to confuse the matter and have to do business with anybody but you. But I will make a deed to you when the work is performed, and you can make it to whoever you like."

Q. You told him that before you signed up the agreement of the 19th of September?

A. It was at that time.

Q. Before you signed that up, you told him about that, did you?

A. Yes.

Q. In that written agreement you were to make an affidavit of the annual work for 1910, were you not?

Mr. HEILIG.—We object to asking the witness as to the contents of a written agreement, or writing signed by him, without exhibiting the writing.

Mr. PRATT.—Q. Did you make that.

The COURT.—Objection sustained.

Mr. PRATT.—Q. Did you make any affidavit that you had done the assessment work on the Daly Bench?

A. No. I did not.

Q. You never filed any, did you?

A. No.

Q. This agreement of the 19th of September, 1910, which you have signed, in one part here says; (reads) "And the said party of the second part does "hereby specially agree not to assign this lease or "lay, or any interest therein or thereunder, and not "to sublet or sub-lease the said demised premises, or "any part thereof, nor to permit the same nor any "part, interest or title therein to pass to any other "person whatever without the written consent of the "party of the first part first had and obtained." Now, just after telling judge Wickersham that Mrs. Patterson was to have that quarter interest, you signed this agreement in which that statement appears, didn't you?

A. Well, I don't know just exactly the particular time, but the conversation was during the time that the papers were signed up.

Q. Did you get any written agreement from Mr. Wickersham that that you could transfer this quarter interest to Mrs. Patterson?

Mr. HEILIG.—We object as immaterial. The only person who could complain about that is judge Wickersham, and he has never complained.

The COURT.—Overruled.

A. No, I never did.

Mr. PRATT.—Q. Was Mrs. Patterson in partners with you on the lease that you had on the Daly Bench then?

A. No sir.

Q. Her agreement with you was that she should sink a hole to bedrock and be entitled to a one-quarter interest?

A. Yes sir.

Q. Why did she sink two?

A. Well, it called for representation work. And I think it calls for two holes to bedrock and for representation work for 1910.

Q. How many feet down was the first hole they sunk?

A. The first hole was I think 100 feet.

Q. How much did they charge you a foot?

A. A dollar a foot.

Q. When that first hole was sunk, sufficient money had been expended for representation work, hadn't it?

A. Well—(Interrupted)

Q. Why was the second hole sunk? You have no explanation?

A. Well, to comply with that agreement, with the conditions.

Q. Can you point out any part of this agreement that would require a second hole? Would you like to look at it and see?

A. No. I don't care to look at it.

Q. Isn't it a fact that Mrs. Patterson at that time was handling your money and keeping it in her

own name and writing out checks for your business on the 19th—(Interrupted)

A. No sir.

Q. —of September, 1910?

A. No sir.

Q. Isn't it a fact that the sinking of those holes was your own personal business, and that you had her write out a check for your benefit?

A. No sir.

Q. Wasn't the second hole that was sunk on the Daly Bench merely for the purpose of doing prospecting under the lease?

A. Well, no, I don't think it was.

Q. You don't think so?

A. No.

Q. What was it for, then?

A. Well, as I say, to fulfill the conditions.

Q. One hundred dollars had been spent on the first hole?

A. One hole to bedrock to represent it, as representation work for 1910.

Q. How much did you think it took for representation work?

A. Well, I didn't know for sure what the representation work—whether drill holes would constitute it.

Q. You didn't know whether one hundred dollars was a sufficient amount at that time?

A. Whether 100 feet of drill hole would count that.

Q. Well, now, if one drill hole wouldn't count, why did you think two would?

A. Well, it would be enough. It would be sure to be enough.

Q. Didn't you know that the law only required one hundred dollars worth of work to be done?

A. Well, possibly.

Q. And you knew that the first hole cost one hundred dollars?

A. Yes.

Q. Still you thought if you drilled that first one that you had to drill a second one to comply with the agreement.

Well, I don't remember exactly. I didn't pay much attention to it, but to have enough done.

Q. Anyway, after those holes were dug, you regarded this property as Mrs. Patterson's, did you?

A. I did that quarter interest.

Q. That is the quarter interest.

A. Yes.

Q. You held this agreement of September 19th, 1910 in your possession and recorded it on the 14th day of November, 1911, didn't you?

A. Yes sir, at that time.

Q. If you still considered it Mrs. Patterson's property, why did you file this agreement which showed that you were to have the quarter interest?

A. Because Mr. Wickersham was out of the country, and we had no deed to it, no chance to get a deed to the quarter interest.

Q. You didn't file anything at that time showing that you had made any agreement with Mrs. Patterson to transfer your right to the quarter in-

terest, did you?

A. No.

Q. Now, on the 14th day of October, 1911, Mr. Wickersham executed a deed to this quarter interest to you, didn't he?

A. What date?

Q. 14th of October, 1911.

A. It was somewhere near that time. I don't remember the exact time.

Mr. PRATT.—Have you the original of that deed, Mr. Heilig?

Mr. HEILIG.—Yes. (Hands paper to Mr. Pratt)

Mr. PRATT.—Q. Did you file that deed of record.

A. That is the deed to the quarter interest?

Q. Yes.

A. Mr. Wickersham and I were together, filing all the papers—the compromise papers with Wheeler and Wickersham.

Q. You read it over, did you?

A. Yes sir.

Q. This says on the back of the original; (reads) “Filed for record at the request of H. J. Patterson”. You admit that you recorded this?

A. Yes.

Q. You read it over before you recorded it?

A. Wickersham handed the papers in, and I paid for the recording.

Q. You read it over?

A. Yes. I think I did.

Q. Did you notice it says: “Said conveyance is “made in consideration of the doing of the assess-

"ment work thereon by the vendee in the year 1910, "in compliance with the United States Statute" Did you notice that?

A. Yes sir.

Mr. PRATT.—I will offer this in evidence. (Marked Plaintiffs Exhibit B)

PLAINTIFFS EXHIBIT B.

THIS INDENTURE made the 14th day of October, in the year of our Lord one thousand nine hundred and eleven, BETWEEN James Wickersham, the party of the first part, and H. J. Patterson, the party of the second part,

WITNESSETH That the said party of the first part, for and in consideration of the sum of One dollars lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, and to his heirs and assigns

An undivided one quarter interest in and to that certain Bench placer mining claim situate in the Fairbanks precinct Alaska, on the left limit of Ester Creek, and known as the Pat Daly bench placer mining claim, and being the second bench claim on the left limit and about opposite of No. 3 creek claim below Discovery on said Ester Creek, and located by Pat Daly on December 1st, 1905.

Said conveyance is made in consideration of the

doing of the assessment work thereon by the vendee in the year 1910, in compliance with the United States Statute.

TO HAVE AND TO HOLD all and singular, the said premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year first above written.

JAMES WICKERSHAM (Seal)

Signed and executed in the presence of

ALBERT R. HEILIG

C. E. WRIGHT

United States of America

Territory of Alaska.—ss.

THIS IS TO CERTIFY: That on this 14th day of October, A. D. 1911, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came James Wickersham, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

(Notarial seal)

ALBERT R. HEILIG.

Notary Public in and for the Territory of Alaska,
residing at Fairbanks.

(Indorsed)

35158. QUIT CLAIM DEED. From James Wickersham to H. J. Patterson Dated 19. UNITED STATES OF AMERICA. Territory of Alaska ss. Filed for record at request of H. J. Patterson on the 10 day of Nov 1911 at 45 Minutes past 9 A. M. and recorded in volume 15 of Deeds, Page 445. Records of Fairbanks Precinct, Territory of Alaska. JOHN F. DILLON Recorder. By C. E. Wright.

Mr. PRATT.—Q. Now, on the 12th day of October, 1911, Mr. Wickersham executed a lease to you on the Daly Bench, did he not?

Mr. HEILIG.—I want to object to the method of examination. This witness has testified on direct examination that, while these instruments bore date as of the date counsel speaks of, the delivery of them was withheld until the settlement was made with the conflicting claim owners; that it was on the 10th of November when that compromise was effected, and that then delivery was made of these papers. I think he should call the attention of the witness to the fact that the papers were signed and executed before their delivery.

Mr. PRATT.—Q. Defendants' Exhibit 2 on this trial, the same being a lease dated the 12th of October, 1911, from James Wickersham to yourself, signed by yourself, on the second page thereof reads as follows: (reads) "As part consideration of this "lease, the party of the second part"—that is yourself—"agrees that his undivided one-quarter interest "in said premises shall be covered and included in

“the terms of this lease and shall also at all times be
“subject to any debtsm defaults or damages result-
“ing from the working under this lease, for violations
“thereof, and the said Daly claim shall at all times be
“worked and considered as a whole between the par-
“ties hereto, and all subject to the terms of this
“lease and it is specially agreed that the party of the
“first part shall have a first lien upon the whole of
“the output of of the whole of the Daly claim, in-
“cluding the undivided one-fourth interest of the
“party of the second part for the payment of the roy-
“alty reserved to the party of the first part and the
“performance of the terms of this lease” Now, if
you considered that claim Mrs. Patterson’s, where
did you consider that you had the authority to bind
her quarter interest in the claim for the proper work-
ing of the lease, the payment of the royalties, and
the payment of all debts in working the claim? Can
you explain that?

A. Well, the legal title to it was in my name.

Q. And you were binding the whole interest?

A. And I didn’t think there was any danger of
anything of the kind.

Q. Although you considered it her claim, you were
in writing stating it was your claim. Have you any
explanation to make of that?

A. Excepting that the title was in my name.

Q. In this same instrument, it reads in another
part: (reads) “and the party of the second part
“further agrees that his undivided one-fourth in-
“terest shall be held liable to the party of the first

“part for all liens or other claims made or adjudged against said property which shall in any way become a charge upon the interest of the party of the first part.” Have you any explanation to make of that statement there, that you were the owner of a one-quarter interest, and that you were binding there that one-quarter interest for the performance of this lease?

Mr. HEILIG.—We object, as needless repetition.

The COURT.—It seems to me that would be a proper question to be asked by the other side. You are not cross-examining the witness. He is your witness.

Mr. PRATT.—He is our witness, but he is an adverse witness.

The COURT.—You have introduced writings there which you claim sustain your contention, and now you are trying to get evidence against them—to cause this witness to put in evidence for the defence.

Mr. HEILIG.—I am willing to let him do that, but I want to shorten this matter, as the witness has already testified concerning it.

The COURT.—Objection sustained. (Plaintiff excepts)

Mr. PRATT.—Q. In another part of this same lease, it reads: (reads) “And the party of the second part does hereby specially agree not to assign this lease or lay or any interest therein or thereunder and not to sublet or sublease the said demised premises or any part thereof nor to permit the same nor any part thereof nor any interest therein to pass to

“any person whatever without the written consent of
“the party of the first part had and obtained, and this
“prohibition shall extend to the undivided one fourth
“interest belonging to the party of the second part
“as fully as to the interest belonging to the party
“of the first part”. Did you get any written agree-
ment from judge Wickersham to transfer that quar-
ter interest to Mrs. Patterson?

A. No.

Q. Now, Mr. Patterson, there was an agreement entered into between the Happy Home People and yourself and Mr. Wickersham, was there not?

A. Yès sir.

Mr. PRATT.—Have you that original, Mr. Heilig?

Mr. HEILIG.—I think so. The compromise of the dispute. (Hands a paper to Mr. Pratt)

Mr. PRATT.—Is that your signature (hands paper to wit.,)

A. That is. Yes.

A. Did you file this of record?

A. They were all filed at the same time.

Q. You notice the recorder's certificate here states: (reads) “Filed for record at the request of H. J. Patterson”. You filed it, did you?

A. I paid for all of them. Mr. Wickersham was present, though at the time they were filed.

(Here a recess is taken until 2 P. M. today.)

September 27, 1913, 2 o'clock P. M.

H. J. PATTERSON resumes his testimony on re-direct.

Mr. PRATT.—I offer this agreement.

Mr. HEILIG.—No objection.

(Marked Plaintiff's Exhibit C)

PLAINTIFF'S EXHIBIT C

THIS AGREEMENT made and entered into on the 8th day of November, A. D. 1911, by and between M. Wagner, C. Wichman, G. Wheeler, M. Beegler and E. M. Horner, parties of the first part, and James Wickersham and H. J. Patterson, parties of the second part, all of Fairbanks Precinct, Alaska,

WITNESSETH:—That the parties of the first part did on or about June 6th, 1908, locate an association placer mining claim of sixty acres, or thereabouts, situate in the Fairbanks Mining District of Alaska, second tier bench off of Eva Creek opposite 2, 3 and 4 creek claims, to be known as the Happy Home Association, described as follows, to wit: Commencing at this stake south east post and running 2600 feet in a northerly direction, then a thousand feet in a westerly direction, then 2600 feet in a southerly direction, then 1000 feet in an easterly direction to stake of beginning, joining second tier bench off of Ester Creek opposite 3 and 4 below left limit; and the location certificate of which was filed for record Sept 1, 1908 at 45 min past 1 p. m. and recorded in the office of the recorder in said precinct on that day in Vol 10 of locations notices and recorded at pages 174 and 175 therein; and subsequently the parties of the first part owners leased so much of said ground as is hereinafter described as overlapping the Pat Daly claim to E. M. Horner lessee; that on the

1st day of December, 1905 Pat Daly located a placer claim in said Fairbanks Precinct on Ester Creek, a tributary of Cripple Creek, described as follows: A second tier bench on left limit opposite No. 3 below Creek Claim, calls for 600 feet upstream or west and 400 feet downstream or east from the initial post and 872 feet back or north from lower right limit corner, thence 1000 feet upstream to upper left limit corner, and thence 872 feet back to upper left limit corner; that stakes were set to mark the boundaries of said claim but were not exactly the distances mentioned in the notice; that discovery and assessmen work were done on said claim, and the location notice was filed for record in the office of the recorder in said district on February 21st, 1906, and same recorded in Vol. 7 of Locations notices page 137; that thereafter the title to said premises was conveyed to and the same is now in the names of the parties of the second part, as owners and lessees; that the claim so located by the parties of the first part overlaps the claim so located for and owned by the parties of the second part as shown on that map of the survey thereof made by C. E. Davidson on the 29th day of September, 1911. That the parties hereto have compromised their differences in respect to the said overlap of the Daly Claim by the Happy Home Association claim, and in consideration thereof the parties of the first part do hereby abandon all right, claim, or title to the whole of the said Pat Daly claim as surveyed and located on the ground from stake to stake by the said C. E. Davidson survey of said Sept

29th, 1911, and in consideration of the conveyance to them of the seventy-five feet strip hereinafter made by the parties of the second part to the parties of the first part, the parties of the first part do hereby sell, assign, set over and quit-claim to the parties of the second part, in the proportions as they now claim the same, the whole of the ground within the said Pat Daly claim as shown in said C. E. Davidson survey of said Sept 29th, 1911; and in consideration of such conveyance to them the parties of the second part do hereby sell, assign, set over and quit claim to the parties of the first part, in the proportions as they now claim the same, a strip of ground off the upper end of the Pat Daly claim, running up and down the general course of Ester Creek, and running seventy-five feet wide parallel to the northely line of said claim as shown on the C. E. Davidson survey of said Sept 29th, 1911, the same to be surveyed and marked off by said Davidson as soon as he can hereafter do the work; the parties of the second part agree that the parties of the first part may permit the water and tailings from the said seventy-five foot strip and the land immediately adjacent and above where said E. M. Horner is now working to flow upon the said Daly claim, but the parties of the first part and their lessees will impound the said tailings with brush and other material so as to pile the same in a good and workmanlike manner on their own ground and as little as practicable on the ground belonging to the parties of the second part. Water reaching the ground of the parties of the second part

may be used by them in mining.

IN WITNESS WHEREOF the parties hereto have set their hands and seals at Fairbanks, Alaska, on the day and year first above written,

M. WAGNER,
CHRIS WICHMAN,
GEO. WHEELER,
M. BEEGLER by WHEELER,
E. M. HORNER & CO.,
Per E. J. HORNER,

Parties of the First Part.

JAMES WICKERSHAM,
H. J. PATTERSON,

Parties of the Second Part.

WITNESSES:

C. E. DAVIDSON,
J. E. COFFER.

Territory of Alaska

TERRITORY OF ALASKA

FAIRBANKS PRECINCT ss

THIS IS TO CERTIFY: That on this 8th day of November, A. D. 1911, there personally appeared before me, the undersigned Notary Public, the above named persons, who are each known to me to be the persons who signed the foregoing instrument and who each signed the same in my presence and who each acknowledged to me that he signed the same freely and voluntarily and for the uses and purposes therein set forth.

IN WITNESS WHEREOF I have hereunto set my hand and notarial seal on the day and date in

this certificate first above written.

(Notarial seal)

JOHN E. COFFER,

Notary Public in and for the Territory of Alaska,
residing at Fairbanks, Alaska.

(Indorsed) 35160. entered, compared, indexed.
Dated; November 8th 1911. M. Wagner et al and
James Wickersham et al.

Deed. (Note: Words "compromise agreement"
marked out in pencil and word "Deed" written above
same in pencil)

TERRITORY OF ALASKA

FOURTH JUDICIAL DIVISION.—ss.

Filed for record at request of H. J. Patterson on
the 10 day of Nov. 1911 at 10 A. M. and recorded in
Vol 15 deeds page 446 Fairbanks Recording Precinct.
JOHN F. DILLON, Recorder. By C. E. Wright,
Deputy.

Mr. PRATT.—(After reading said Exhibit C) Did
you consult Mrs. Patterson in regard to that agree-
ment.

A. Yes.

Q. Got her permission, did you?

A. Yes.

Q. To do all that?

A. She— Well, of course, there was a good deal
of argument.

Q. You got her consent to make such an agree-
ment?

A. Yes.

Q. Had you consulted her previous to that with
reference to the lease?

A. We talked it over at home.

Q. Your lease of October 12, 1911 wherein you made your quarter interest, or gave a quarter—gave a lien upon your quarter interest in the Daly Bench for the payment of royalties and to assure the payment of all debts in working the claim, had you talked that over with Mrs. Patterson beforehand?

Mr. HEILIG.—We object to the form on the question, as not being in accordance with the instrument itself, nor in accordance with any answer that the witness has heretofore made, in the form in which it is put.

The COURT.—I think the witness has said that it was not his quarter interest.

Mr. PRATT.—Q. Did you consult Mrs. Patterson before you drew up the lease dated the 12th of October, 1911, with Mr. Wickersham and get her consent to the terms that you afterwards embodied in it?

Mr. HEILIG.—We object to the form of that question “before he drew up the lease”. He didn’t draw up any lease.

Mr. PRATT.—The lease was drawn up.

The COURT.—I think that removes the objection. He may answer the question.

A. I don’t remember exactly whether I did or not—the exact circumstances at that time, but I know I told her afterwards, but I am not positively certain as to before.

Mr. PRATT.—Q. Did you consult her before you made the deed to the property to her?

A. Before I made the deed to her?

A. Yes.

A. Yes. She had asked me to make the deed to her as soon as I got it.

Q. She had?

A. She was disappointed that the deed wasn't made to her in the first place.

Q. You told her you were going to do it, did you?

A. I did.

Q. Did she know at the time that you made the deed that you were going to make it that day?

A. I don't know exactly whether she did or not, not particularly.

Q. Did you deliver the deed to her?

Mr. HEILIG.—That is admitted by the pleadings, that the deed was made to her on the 27th of November. They allege it affirmatively and we allege it affirmatively; and we object to any testimony on that subject.

The COURT.—What is the purpose.

Mr. PRATT.—I wanted to know whether she knew anything about it; to show it was merely a voluntary deed made out by this witness and filed by himself without her knowledge.

Mr. HEILIG.—He has already testified that he had promised to make it to her; that she urged him to make it, and that he made it.

The COURT.—Well, he may answer the question.

A. What is the question?

Q. (question read: "Did you deliver the deed to her")

A. On that day?

Q. Well, at all. Did you deliver it to her?

A. Yes.

Q. When?

A. As soon as I got it back.

Q. Back from where?

A. From the recording office.

Q. From the recording office?

A. Yes.

Q. You had it recorded then?

A. I had it made out and left it with Guy Erwin to record, because I wanted to catch the car out to Engineer that evening. Mr. Hamilton and I had been out looking over the ground.

Q. You had spent a good deal of your own money on the Daly Bench prior to the time that you delivered the deed to Mrs. Patterson hadn't you?

A. I did under the lease.

Q. How much did you spend?

A. Well, I couldn't say now just how much prior to the making of the deed.

Q. Just—(Interrupted)

A. I had to regain possession, help to regain possession of the ground in order to renew my lease.

Q. Something over fourteen hundred dollars, wasn't it?

A. That was not all prior to the making of the deed. That work was continued through until January—the sinking of the shaft. We had put some men on there to regain possession of the ground—

to hold possession of the ground—putting up buildings.

Q. That was all your own money, and none of it Mrs. Patterson's?

A. No. None of Mrs. Patterson's at all.

Q. Did she ever reimburse you for that expenditure?

A. This was under the lease. It was to renew my lease with Wickersham.

Mr. HEILIG.—You didn't answer the question. Read the question.

Q. (Question read: "Did she ever reimburse you for that expenditure?")

A. No.

Mr. PRATT.—Q. After you got that lease, you assigned it to Mr. Hamilton for what consideration? What did Hamilton give you for it?

A. Well—

Mr. HEILIG.—Do you mean whether he paid him any money for it?

Mr. PRATT.—The witness understand the question.

Mr. HEILIG.—I think the witness doesn't understand it.

Mr. CLARK.—He has not said so.

A. I didn't receive any money for it. No.

Mr. PRATT.—Q. What was the consideration, then, for your transfer to Hamilton?

A. There was no real consideration.

Q. Wasn't the lease valuable?

A. It was in a way.

Q. But you couldn't get anything for it?

A. There was a— It was a pretty mixed up affair, that lease.

Mr. PRATT.—That is all.

Mr. HEILIG.—That is all.

JOHN R. JUNKIN, a witness for plaintiff, after being sworn, testified as follows, to-wit:—

DIRECT EXAMINATION.

BY MR. PRATT:

Q. Mr. Junkin. Where were you working in the spring of 1911 and summer of 1911?

A. On the Last Chance Association on Engineer Creek.

Q. For whom?

A. For H. J. Patterson.

Q. Do you remember hearing about Horner & Company striking pay over on Eva Creek in the summer?

A. I do.

Q. About that time did you have a conversation with Mr. Patterson relative to the property which he owned over there?

A. I did.

Q. State that conversation.

A. Well, he told me about Horner striking the pay, and he—Mr. Patterson owning a quarter interest in the Daly Bench, just by where Horner struck the pay.

Q. Did you later on have another conversation relative to that claim and his ownership of that?

A. Yes. We had talked about it quite often. Later on he talked to me.

Mr. HEILIG.—Fix the date. The first conversation you fixed in the summer of 1911. Now, if you testify to any other conversation, we will require the time to be fixed.

Mr. PRATT.—Q. Do you remember another conversation?

A. I do.

Q. At what time and place?

A. Well, it was in the boiler house on the Last Chance Association. I think it was sometime in August.

Q. What year?

A. 1911. He was talking about opening up that ground over there, and he talked to me about going over later in the season.

Q. Did he say anything more?

A. Well, first he asked me if I would go over and look after his interest there in the lay, if he should make final arrangements to carry the lay through. And afterwards he told me that he couldn't finance the lay, but he asked me if I wanted the lay. In fact I had asked him if I could have a lay on the upper end of the claim. He asked me if I could finance it, and I told him I could, and he promised to give me the lay, and later on he told me that he couldn't give it to me.

Q. Did you have any more conversations concerning that bench?

A. Yes. He talked about it quite often. After-

wards, I think in the latter part of October, or early in November, one day Mr Peoples was out there—
(Interrupted)

Q. What was Mr Peoples' purpose there, if you know?

A. I had an idea, but I didn't know for a fact. But Mr. Patterson did tell me that Peoples was out there and was pressing him for money.

Q. Was what?

A. Was pressing him for money.

Q. Yes?

A. And he said if they kept on pressing him that he would put the Eva Creek property in his wife's name, and would let Mr Peoples and the rest of his creditors do whatever they liked about it. But he said that he would guarantee the men's wages out of the Eva Creek property, provided he couldn't make the Last Chance Association lay pay.

Q. When you said "Eva Creek property", what property was mentioned?

A. The Daly Bench.

Q. Did he use the terms interchangeably, the Eva Creek property and the Daly Bench?

A. Sometimes he called it the Daly Bench and sometimes the Eva Creek property.

Q. What did you say then?

A. I asked him why he hadn't it in his wife's name long ago if he expected they were going to make trouble for him. He said if he put it in his wife's name it would hurt his credit still further.

Mr. PRATT.—You may cross-examine.

CROSS-EXAMINATION.

By Mr. HEILIG.—Q. All this time you knew that he had a lay on the Daly Bench.

A. Yes. He had told me that he had a lay on the whole bench, and a quarter interest in the property.

Q. What?

A. He told me had a seventy-five per cent lay on the whole bench besides—in addition to a quarter interest in the property.

Mr. HEILIG.—That is all.

E. R. PEOPLES, a witness for plaintiff, after being duly sworn, testified as follows, to-wit:—

DIRECT EXAMINATION.

By Mr. CLARK.—Q. Your name is E. R. Peoples.

A. Yes sir.

Q. You are a merchant here, are you not?

A. Yes sir.

Q. Are you acquainted with H. J. Patterson?

A. Yes sir.

Q. Do you know when he was carrying on mining operations on the Last Chance Association claim on Engineer Creek?

A. I do.

Q. Was he dealing with you at that time?

A. Yes sir.

Q. What was he purchasing from you?

A. Well, general mining supplies.

Q. General merchandise such as he needed?

A. Yes sir.

Q. Was he indebted to you along about the month of November, 1911?

A. Yes sir.

Q. Do you remember in how great a sum?

A. It was close I believe to four thousand dollars?

Q. Did you make any effort to collect the money from Mr. Patterson, or to procure any security for your claim?

A. Yes sir.

Q. Did you have any talk with him out on the ground concerning any property that he might own other than the lay he was then operating?

A. At the mine where he was working?

Q. Yes.

A. Not that I remember of, there.

Q. Did you have any conversation with him here in town?

A. Yes.

Q. Can you fix anywhere near the date of that conversation?

A. On the 15th of November I received a check from Mr Patterson for a thousand dollars, and we were unable to get it cashed. Well, Mr. Patterson at that time told us from the following cleanup that he would take that up. This he failed to do, and I should judge about a week later I had a conversation with him concerning other property that he had.

Q. Had you in the meantime seen any record, or heard anything about any deed being recorded con-

veying to him an interest in the Daly Bench on Eva Creek?

A. Yes sir.

Q. Now, where did the conversation take place?

A. In the office of the store.

Mr. HEILIG.—When was this that you saw the record?

A. It was just a day or so, I judge, after, or a few days after the conveyance to Patterson.

Mr. CLARK.—Q. From judge Wickersham?

A. Yes sir. I believe it was from the judge.

Q. Who called your attention to the fact that the conveyance had been made?

The COURT.—What conveyance?

Mr. CLARK.—From judge Wickersham to Patterson of an interest in the Daly Bench.

Q. Who called your attention to the fact that a conveyance had been made?

A. I noticed it in the paper, and Mr. Stroecker also called my attention to it.

Q. Mr. Stroecker was then and is now in your employ?

A. Yes.

Q. And Mr. Stroecker is now trustee in bankruptcy in this H. J. Patterson matter.

A. Yes sir.

Q. And is the plaintiff in this action.

A. Yes sir.

Q. That was before the bankruptcy proceedings were instituted.

A. Yes sir.

Q. Just tell what you did after you ascertained that that transfer had been made from judge Wickersham to Mr Patterson.

A. I asked Mr Patterson if he would not give us security on his interest in this ground.

Q. What ground?

A. The ground on Ester Creek.

Q. Do you mean Ester Creek or Eva Creek?

A. Of Eva Creek, tributary of Ester Creek.

Q. Is that the Daly Bench that you are referring to?

A. Yes sir. And he informed me at that time that through an arrangement with Mr. Wickersham that he couldn't give any security on that ground or transfer it in any manner. That was the sum and substance of the conversation.

Q. What did he say about the ownership of that interest?

A. There was nothing said regarding that.

Q. What did you say to him; remember, as near as you can, the words you used to him in asking for security?

A. I suggested to him that he had a quarter interest in that, and he should put it up as security.

Q. Did he deny that he had a quarter interest?

A. No sir.

Q. The reason he gave you for not putting it up was that he had a written agreement—(interrupted)

A. With judge Wickersham.

Q. (Continuing)—with judge Wickersham whereby he couldn't incumber it?

A. Yes sir.

Q. Did you talk with him anything about the possibility of that ground producing any money, or anything of that kind?

A. I think not at that time.

Q. Did you ever have any other conversation with him at any other time about that particular property?

A. No sir; that is, not that I remember of now.

Q. Did you receive any information thereafter that he had conveyed that quarter interest to Mrs. Patterson?

A. Yes sir.

Q. How long after that, if you remember?

A. I should judge it would be two weeks after that.

Q. Did you have any talk with him after you saw that he had conveyed it to Mrs. Patterson?

A. No sir.

Q. Shortly after that, you instituted suit in this Court against him, did you not?

A. Yes sir.

Q. Then, thereafter, instituted an action to set aside the conveyance.

A. Yes sir.

Q. And, after this bankruptcy proceeding was instituted, that suit was practically abandoned and a similar suit was instituted by the trustee in bankruptcy, the present plaintiff in this action.

A. Yes sir.

Mr. HEILIG.—The record will show that that suit

was dismissed.

Mr. CLARK.—I don't know whether it was or not.

Q. Now, in regard to when this transfer to Mrs. Patterson took place, do you remember whether or not it was a week or two after this conversation with Mr Patterson, or was it only a few days after?

Mr. HEILIG.—Which conversation?

Mr. CLARK.—This conversation in which he stated that he couldn't transfer the property.

A. In referring to that, I remember that it was prior to bringing the last cleanup from the claim. If I remember right, that was the 25th or 26th of the month, and this conversation was prior to that time.

Q. How much prior, if you can state?

A. Well, I should say it was three or four or five days.

Q. It was just in that period of time there that this took place, but you can't fix the date more definitely than that.

A. Yes.

Q. Was Mr. Stroecker in the store at the time you had your conversation with Patterson?

A. Yes sir.

Q. Is he the one that called your attention to this transfer?

A. The transfer from Mr. Wickersham to Patterson, yes sir; and also I think he called my attention to the other one later on.

Mr. CLARK.—Your witness.

CROSS-EXAMINATION.

By Mr. HEILIG.—Q. You had considerable deal-

ings with Mr. Patterson in connection with his mining on the Last Chance claim on Engineer Creek.

A. Yes sir.

Q. You had dealings with him from the very beginning of his operations there.

A. Yes sir.

Q. You were here at the time he commenced operations in February 1911?

A. I think I was. Yes.

Q. You have a partner by the name of Johnson.

A. Mr. Johnson is with us.

Mr. CLARK.—We object as not cross-examination.

The COURT.—The question has been answered.

(Mr. Heilig states what he desires to prove by the witness on cross-examination. Mr. Clark objects as immaterial, and the court states that it is too remote.)

Mr. HEILIG.—That is all, then.

Mr. CLARK.—Plaintiff rests.

Mr. HEILIG.—If the Court please. Ordinarily in a case of this kind I should not move for a dismissal. But the plaintiffs, by making Mr Patterson their own witness, have vouched so thoroughly for his credibility that, together with that, and other testimony, none of which is binding upon Mrs Patterson at all, I think that, under the authorities which I purpose to produce, that they have absolutely failed to support their allegations. In other words, that they have absolutely failed to prove that Mr Patterson did convey on the 27th day of November, 1911, this interest in the Daly Bench to his wife in

fraud of his creditors, with the intent to defraud them, and with intent, on the part of Mrs Patterson when she received the deed, to defraud them. They must show in a case of this kind, under the section in our bankruptcy law which permits a trustee to sue wherever a creditor could sue, not only that Mr Patterson, when he made this deed, intended to defraud his creditors, but they must show that Mrs Patterson, when she received the deed, intended to defraud his creditors. They have absolutely failed to show any intent on her part. They have failed to show, outside of the testimony of Junkin who details a conversation which we had to admit for this reason: That they made Patterson a party. He is not a necessary party under all the authorities, but it was proper that he should be made a party and therefore I could not move to strike him out. But the rule is absolute and uniform that, while he being a party would make evidence of that kind admissible as to his statements which he had made, there was no evidence to show that, at the time he made this conveyance, he did it for the purpose of defrauding his creditors, much less is there any evidence that, at the time Mrs Patterson received this deed, she had any knowledge of such intent on his part. Because there is not a scintilla of evidence on that, nor is there a scintilla of evidence that she, by accepting the deed, intended to defraud any creditors. On the contrary, their evidence shows positively that her's was the only money that entered into the purchase of that quarter interest. Their witness proves abso-

lutely that he never put a dollar into that purchase. The purchase price was the expense of sinking a hole to bedrock and doing the assessment work. That purchase price was paid by Mrs Patterson, and is not disputed and not denied, and it stands absolutely. Patterson testifies that he never put a dollar into the purchase of that quarter interest. (Reads authorities and argues motion)

Mr Pratt and Mr Clark, on behalf of plaintiff, resist motion and argue same, and the matter is continued until Monday, September 29, 1913, at 10 o'clock A. M.

Monday, September 29, 1913, 10 A. M.

Arguments on motion concluded, and the matter submitted to the Court for decision, whereupon the Court grants the motion of defendants to dismiss the case. Plaintiff excepts thereto and an exception is allowed by the Court.

DEFENDANTS' EXHIBIT "2."

Lease of Mining Ground.

This indenture of lease made and entered into this 12th day of October, 1911, by and between James Wickersham, of Fairbanks, Alaska, the party of the first part, and H. J. Patterson, of the same place, the party of the second part,

Witnesseth: That the party of the first part is the owner of an undivided three-fourths interest in and the party of the second part is the owner of an undivided one-fourth interest in that certain placer min-

ing claim known as the "Daly Bench", situate on the left limit of Ester Creek in the second tier of benches and about opposite three below discovery on the left limit of said Ester Creek, Fairbanks Precinct, Alaska, and adjoining the Norton bench, which said Daly Bench was located by Pat Daly on December 1, 1905, the location notice of which is recorded at page 137, Vol. 7 of Locations, in the office of the recorder in said Fairbanks Precinct, Alaska; that the party of the second part has applied for and the party of the first party hereby gives to the party of the second part a lease upon the said claim in consideration of the terms and covenants of this lease and also in consideration of the terms and agreements contained in that certain other contract signed between these parties at the same time as this lease, which said other agreement is as much a part of this agreement of lease as if written in its body in consideration of the rents, royalties, covenants and agreements hereinafter reserved and by the said party of the second part to be kept, paid, and performed, and in consideration of the performance of the other mentioned agreement, of even date herewith, the party of the first part does hereby grant, demise, let and lease unto the said party of the second part, the party of the second part does hereby accept the lease of the whole of the said premises together with all appurtenances and the right and privilege to prospect and mine the same and to extract therefrom all the gold and gold bearing placers therein contained subject to the terms of this agreement:

To have and to hold the same unto the said party of the second part from the date of this agreement until the 12th day of October, 1915, unless sooner determined or forfeited through the failure of the party of the second part to pay and deliver the rents and royalties agreed upon, or for other violation of the terms, covenants and conditions in this lease, or the agreement of even date herewith, against the said party of the second part reserved.

As part consideration of this lease the party of the second part agrees that his undivided one-fourth interest in said premises shall be covered and included in the terms of this lease and shall also at all times be subject to any debts, defaults or damages resulting from the working under this lease, or for violation thereof, and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease and it is especially agreed that the party of the first part shall have a first lien upon the whole of the output of the whole of the Daly claim, including the undivided one fourth interest of the party of the second part for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease.

In consideration of the said demise and the lease the said party of the second part does hereby covenant and agree to and with the said party of the first part as foll to-wit: To enter upon the said demised premises wit thirty days after the signing of these presents and begin and thereafter continuously

maintain possession and mine the said mining claim in a good and miner like manner with due regard to the development, preservation and value of the same as a mining claim, to leave all unworked ground intact and adjacent; to operate no rocker, longtom or other kindred machine except for prospecting; to do no panning thereon except to keep account of and test the value of the ground, and of such mineral obtained by rocker, longtom, panning or otherwise to keep accurate account and include the gross amount thereof in the gross output of gold produced from said premises; to work and mine said premises steadily and continuously from the date hereof until the termination of this lease; to well and sufficiently timber all shafts, drifts, tunnels and passage ways where proper in accordance with good mining and not to mine, drift or excavate outside the boundaries of said demised premises, and should the party of the second part or any one for or under him do so or otherwise interfere with other property then any damage resulting therefrom to any person shall be paid by the said party of the second part who shall save the party of the first part harmless; to excavate, mine and remove all pay dirt from the tunnels, drifts or other openings in said mine which shall contain at least one dollar and a half to the square foot of bedrock.

And the party of the second part further agrees that immediately upon locating pay on said demised premises he will put such a sufficient force of men and machinery at work thereon as is necessary to

work the same in a good and workmanlike manner and will continue to work the same from that time until the same is worked out; he agrees to furnish all the necessary tools, provisions, labor and outfit for the purpose of properly working the said premises during the whole of the term without any expense whatever to the party of the first part; and the party of the second part hereby expressly covenants and agrees that he will not allow or permit any lien or liens to be adjudged against the premises or upon the dump or gold or gold dust coming from the said premises, and the party of the second part will hold and keep the party of the first part and all his interest in the claim or output safe and harmless from any such liens for labor or otherwise, and the party of the second part agrees to post and maintain a notice in writing upon said premises in the name of the party of the first part giving notice to all persons, laborers, materialmen and others that no claim of lien shall be made thereon by any laborer, materialman or other person, in accordance with the statutes, and the party of the second part further agrees that his undivided one fourth interest shall be held liable to the party of the first part for all liens or other claims made or adjudged against said property which shall in any way become a charge upon the interest of the party of the first part.

The party of the second part further agrees to permit the party of the first part or his agent at any time to enter into and upon all parts of the demised premises for the purpose of inspecting, testing, pan-

ning and determining the condition and value of the dirt in said ground, or to ascertain any other fact which in the discretion of the party of the first part or his agent is necessary and proper to his security, and will at all times permit the party of the first part or his agent to inspect the books, records and accounts, either in his books or in the bank, assay office or other place where the evidence and record can be found, and will permit the party of the first part or his agent to acquire in all proper ways and means any and all information regarding the business thereof or connected therewith.

The party of the second part agrees specially to make each and every cleanup in the presence of the party of the first part, or his duly authorized agent, and to give him or his agent reasonable advance notice so that he can be present and specially agrees to deliver to the party of the first part or to his duly authorized agent, the full twenty five per cent. or one quarter of the gross amount of each and every cleanup at the time the same is finished, and it is agreed by the party of the first part that he or his duly authorized agent will at that time and place give to the party of the second part a receipt in writing for all such gold or gold dust so then received.

And it is of the essence of this contract, and the party of the second part hereby specially agrees to pay and to deliver to the party of the first part, or to his duly authorized agent, in consideration of this lease, as the share, royalty and rental of the party of the first part twenty five (25 per cent) per cent. or

a full one fourth of the gross amount of all gold and gold dust and other mineral extracted, mined, taken or produced from the whole of the said premises during the whole of the term of this lease or lay, and agrees to pay and deliver said one fourth part of the said gross output of the whole of the said mining claim to the said party of the first part or his fully authorized agent immediately upon and after each cleanup is so made, without delay or default for any reason whatever.

And the party of the second part does hereby specially agree not to assign this lease or lay or any interest therein or thereunder and not to sublet or sublease the said demised premises or any part thereof nor to permit the same nor any part thereof nor any interest therein to pass to any other person whatever without the written consent of the party of the first part had and obtained, and this prohibition shall extend to the undivided one fourth interest belonging to the party of the second part as fully as to the interest belonging to the party of the first part.

The party of the second part further agrees that he will do the annual assessment work on said claim for the years 1911, 1912, 1913, 1914, and 1915, and that he will also make and file for record in the office of the recorder in the precinct where said claim is located the proof thereof within the time limited by law to secure the greatest legal advantage thereof to the owners of said claim.

The party of the second part agrees to deliver up to the party of the first part the whole of the prem-

ises belonging to the party of the first part, or to his vendee, upon the expiration of this lease, and all the appurtenances^{and improvements} thereunto belonging, free and clear of all incumbrances, liens, or taxes.

And it is further agreed by the party of the second part that if he or any person in possession through or under him, shall fail, neglect or refuse to work said ground continuously and in good faith for a period of more than sixty days, without the written consent of the party of the first part or his duly authorized agent, then and in that event the party of the first part, or his duly authorized agent may at his option declare the lease to be forfeited and at an end, and the party of the first part or his duly authorized agent, or his vendee may enter into possession thereof and remove all persons therefrom and take exclusive possession thereof.

And finally, upon the violation of any of the terms, covenants or conditions of this lease by the party of the second part, or by any person acting by, through or under him, through purpose, neglect or failure to fairly and promptly comply therewith as specifically herein written, the term of this lease or lay, at the option of the party of the first part, or his duly authorized agent, shall expire and be at an end, and the said premises with the appurtenances and all improvements thereon, save only the machinery and personal property belonging to the party of the second part, or those acting within the terms of this lease by, through or under him, shall be immediately within the possession and under the con-

trol of the party of the first part or his duly authorized agent, and the party of the first part or his duly authorized agent may with or without demand enter upon said premises and dispossess any and all persons occupying the same with or without force and with or without process of law.

Each and every clause, covenant, term and condition of this agreement shall extend to the heirs, executors or administrators of the parties hereto and to the assigns or vendees of either.

In witness whereof the parties hereto have hereunto set their hands and seals, in duplicate, the day and year first above written.

JAMES WICKERSHAM (Seal)

H. J. PATTERSON (Seal)

In presence of

ALBERT R. HEILIG

JOHN L. MCGINN.

Territory of Alaska

Fairbanks Precinct ss.

This is to certify that on this 14 day of October, 1911, before me, the undersigned, a notary public in and for the Territory of Alaska, residing at Fairbanks therein, and being duly commissioned and sworn, there personally appeared James Wickersham and H. J. Patterson, to me known to be the individuals described in and who executed the within agreement, and they each of them, each for himself acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

In testimony whereof I have hereunto set my hand and notarial seal the day and year in this certificate first above written.

(Notarial Seal) ALBERT R. HEILIG,
Notary Public in and for the Territory of Alaska, re-
siding at Fairbanks therein.

The share, royalty, or rental to be paid to the lessor by the lessee, under the terms of the hereto attached lease, is hereby reduced from twenty-five per cent. to twenty per cent upon the gross output of the ground described in said lease; in all other respects the lease to remain in its original form.

Dated at Fairbanks, Alaska, January 29, 1912.

JAMES WICKERSHAM

By HENRY T RAY

his atty in fact.

Witness: Albert R. Heilig.

Accepted:

(Indorsed: 35159 Entered Compared. Agreement Between James Wickersham and H. J. Patterson Dated October 1911. Territory of Alaska Fourth Judicial Division ss. Filed for Record at request of H. J. Patterson on the 10 day of Nov 1911 at 50 min. past 10 a. m. and Recorded in Vol. 5 of Leases page 216 Fairbanks Recording District. John F. Dillon Recorder. By C. E. Wright, Deputy.)

DEFENDANTS' EXHIBIT "3".

Agreement.

This indenture made and entered into this 19th day of September, 1910, by and between James Wickersham, of Fairbanks, Alaska, the party of the first

part, and H. J. Patterson, of Ester Creek, Fairbanks Precinct, Alaska, the party of the second part,

Witnesseth: That the party of the first part is the owner and in possession of that certain placer mining claim known as the "Daly Bench", situate on the left limit of Ester Creek in the second tier of benches and about opposite Nos. 2 and 3 below Discovery on the said left limit of said Ester Creek, Fairbanks Precinct, Territory of Alaska, and the party of the second part desires to prospect thereof and to take a lease for the future working thereof; in consideration of the sinking of a hole from the surface to bed-rock thereon for the purpose of prospecting the said ground and determining its value by the party of the second part at his own expense, the party of the first part does hereby agree to make, sign and deliver to the party of the second part a quitclaim deed to an undivided one-fourth interest in the said premises; the party of the second part undertakes hereby, in consideration of said agreement and transfer to sink said hole upon the said premises and to do the assessment work for the year 1910 without any expense whatever to the party of the first part; in further consideration of the rents, royalties, covenants and agreements hereinafter reserved and by the said party of the second part to be kept, paid, and performed, the party of the first does hereby grant, demise, let, and lease unto the said party of the second part the whole of the said premises together with all the appurtenances and the right and privilege to further prospect and mine the same and to

extract therefrom all of the gold and gold bearing rock, earth, and gravel therein contained.

To have and to hold the same unto the said party of the second part from the date of this agreement until the 19th day of September, 1912, unless sooner determined or forfeited through the failure of the party of the second part to pay and deliver the rent agreed upon or from some other violation of the terms, covenants and conditions hereinafter contained or any of them against the said party of the second part reserved.

And in consideration of the said demise the said party of the second part does covenant and agree to and with the said party of the first part as follows to wit:

To enter upon said demised premises within a reasonable time after the signing and sealing of these presents and to dig, excavate, bore or otherwise sink one hole from the surface to bedrock upon said claim for the purpose of prospecting the said ground and doing the assessment work for the year 1910.

Ans the party of the second part further agrees that he make, sign, and cause to be recorded in the office of the Recorder in and for the Fairbanks Precinct, Territory of Alaska, an affidavit proving the doing of the assessment work thereon for the year 1910.

And the party of the second part further agrees to enter upon said premises within a reasonable time after the signing of these presents and proceed to work the same in a minerlike manner with due re-

gard to the development, preservation and value of the said demised premises; to leave all unworked ground intact and adjacent; to operate no rocker, long tom or other kindred machine; to do no panning thereon save and except to keep account of and test the value of the ground worked, and of such panning to keep an accurate account and include the gross amount thereof in the gross output of gold produced from said premises; to work and mine said demised premises steadily and continuously from the date hereof until the termination of this lease; to well and sufficiently timber all shafts, drifts, tunnels and passageways where proper in accordance with good mining and not to drift or excavate outside the boundaries of said demised premises, and should said party of the second part so do then any damage or damages resulting therefrom to any person or persons owning or operating adjacent mines or mining ground shall be paid by the said party of the second part and save the party of the first part harmless because thereof.

And the said party of the second part hereby expressly covenants and agrees that he will not allow or permit any lien or liens to be filed or any claim or any kind to be made by, through or under him upon any part or portion of the premises or title therein claimed or owned by the party of the first part, nor shall any part or portion of the dum or dumps or the proceeds thereof or the buildings or other improvements thereon to be subjected to any lien or liens for any labor or material and as against the

same the said party of the ^{second}~~first~~ part will hold and keep the party of the first part and the said demised premises safe and harmless, and the said party of the second part will post a notice in writing upon said premises in the name of the party of the first part giving notice that no claim or lien shall be made thereon by any laborer or materialman or other person and said notice shall be filed in accordance with the statute in such case now made and provided.

And the said party of the second part further agrees to permit the party of the first part or his agent at any time to enter into and upon the said demised premises for the purpose of inspecting, testing, panning and determining the condition and value thereof and of the gold bearing gravels therein and will permit him or his agent to inspect the books and records of the said party of the second part relating thereto and will permit him to acquire therefrom any and all information regarding the prosecution of said work by the said party of the second part.

And the said party of the second part does hereby specially agree not to assign this lease or lay or any interest therein or thereunder and not to sublet or sublease the said demised premises or any part thereof nor to permit the same nor any part, interest or title therein to pass to any other person whatever without the written consent of the party of the first part first had and obtained.

And the party of the second part agrees to deliver up to the party of the first part upon the expiration of this lease the whole of the premises so owned by

the party of the first part and all and every the appurtenances and improvements thereunto belonging.

And the party of the second part further specially agrees to make each and every cleanup in the presence of the party of the first part or his agent and to give due notice thereof.

And the said party of the second part further agrees to pay to the party of the first part as his share or royalty, in consideration of this demise twenty-five per cent. of all the gold, gold dust and other mineral extracted, mined, taken and produced from the said ground during the term of this lease or lay and will pay the same to the party of the first part immediately after each cleanup, provided, that if the party of the second part shall comply with his part of the agreement herein and sink the said hole to bedrock as provided herein the party of the first part will convey the said one-fourth interest to him and then the said party of the second part shall only pay to the party of the first part twenty-five per cent of three-fourths of said output.

It is further agreed that the party of the second part shall and will furnish all the necessary tools, provisions, labor, and outfit for the proper working of the said demised premises, during the whole of the term without any expense whatever to the party of the first part.

And it is further agreed by the party of the second part that he will immediately upon locating pay thereon put such a force of men and machinery at work thereon as is necessary to work the same in

a good and workmanlike manner and will continue to work the same from that time until the end of the term of this lease. .

And it is further agreed by the party of the second part that if he shall fail, refuse, or neglect to continue his work on the said ground for as much as sixty days at any time then this lease may be declared to be at an end by the party of the first part who may thereupon enter upon the said premises and remove all persons therefrom and take exclusive possession thereof.

And finally upon the violation or failure by the said party of the second part or any person or persons under him, of any of the terms, covenants, and conditions herein prescribed, the term of this lease or lay shall, at the option of the party of the first part expire and the said premises and every part thereof, with the apurtenances and improvements, save the personal property belonging to the party of the second part shall become forfeited to the party of the first part and he may with or without demand enter upon said premises and dispossess any and all persons occupying the same with or without force and with or without process of law. Each and every clause, covenant, term, and condition of this agreement shall extend to the heirs, executors, and administrators of the parties hereto and to the assigns of either.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

JAMES WICKERSHAM (Seal)

H. J. PATTERSON (Seal)

In the Presence of Henry Roden.

Territory of Alaska

Fairbanks Precinct.—ss.

This is to certify that on this 19 day of September, 1910, before me, a notary public in and for the Territory of Alaska, residing therein, duly commissioned and sworn, personally appeared James Wickersham and H. J. Patterson, to me known to be the individuals described in and who executed the within lease or lay agreement, and they and each of them, each for himself and not one for the other acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year in this instrument first above written.

(Notarial Seal)

HENRY RODEN

Notary Public in and for Alaska.

(Indorsed: 34520 Entered Compared Agreement Between James Wickersham And H. J. Patterson Dated September 19, 1910 Territory of Alaska Fourth Judicial Division ss. Filed for Record at request of H. J. Patterson on the 14 day of Aug 1911 at 15 min. past 3 P. M. and Recorded in Vol. 5 of Miscel page 255 Fairbanks Recording District. John F. Dillon Recorder.)

That, thereafter and on or about the 3d day of October 1913, the Court made and entered the following judgment in the above entitled cause, to-wit:

[Title of Court and Cause.]

JUDGMENT.

Be it remembered that this action came on for trial by the Court, on the 26th day of September 1913, being the day heretofore set for the trial thereof by consent of both parties; then appeared the plaintiff with his attorneys John A. Clark and Harry E. Pratt, and the defendants with their attorney A. R. Heilig, and both parties announced themselves ready for trial; thereupon the plaintiff, on said day and the following day, submitted all his evidence, including documentary evidence and the oral testimony of H. J. Patterson, John Junkin, and E. R. Peoples, and then rested his case; whereupon the defendants moved the Court for judgment, dismissing this action, upon the ground that the evidence submitted by the plaintiff conclusively showed that the plaintiff was not entitled to the relief claimed in his complaint, nor any part thereof, which motion was resisted by the plaintiff; whereupon the Court heard arguments of counsel for the plaintiff and defendants respectively, and, on the 29th day of September 1913, announced in open Court its decision that, from the evidence submitted by the plaintiff, it appeared that plaintiff was not entitled to the relief claimed in his complaint, nor any part thereof; and the time for filing a motion for a new trial having expired, without said motion being filed; in consideration of the premises, it is now

Ordered, adjudged, and decreed that the plaintiff

is not entitled to the relief claimed in his complaint, nor any part thereof, and that this action be, and the same is, hereby dismissed.

And it further appearing, from the records of this action, that, on the 17th day of May 1912, an order was made in this cause, directing H. C. Hamilton, as lessee of the Daly ench, described in the complaint herein, deposit with the clerk of this Court five per cent. of the gross amount of gold mined by him upon said mining claim during the pendency of this action, as royalty accruing to the owner of the undivided one-fourth interest in said Daly Bench the title to which is in controversy in this action, to be held to await the determination thereof, and that the value of the said five per cent. of the gross amount of gold so mined by the said Hamilton is \$5174.66;

It is further ordered that, in the event that, within ten days from the date of this judgment, the plaintiff has not filed with the clerk of this Court a supersedeas bond, approved by the Court, for an appeal from this judgment, that the clerk of this Court pay to the said Mariam A. Patterson, or her attorney A. R. Heilig, the said sum of \$5174.66, if said gold dust or money has been deposited with him, and that, if the said Hamilton has deposited said gold dust with the American Bank of Alaska, that then said bank pay said sum to the said Mariam A. Patterson, or her

said attorney.

Dated, October 3, 1913.

By the Court:

F. E. FULLER,

District Judge.

To the entry of which judgment plaintiff then and there excepted, which exception was allowed.

And now, in furtherance of justice and that right may be done, the plaintiff in the above entitled action, within the time allowed by law and the orders of this Court extending his time within which to prepare, serve, and have settled his bill of exceptions in this cause, herewith presents the foregoing bill of exceptions in the above entitled cause, and prays that the same may be settled, signed, and allowed by the Judge of this Court, in the manner prescribed by law.

McGOWAN & CLARK,

Attorneys for Plaintiff.

ORDER ALLOWING BILL OF EXCEPTIONS.

The plaintiff, by his attorneys Messrs McGowan & Clark, pursuant to notice thereof, duly served on the attorney for the defendants, having, on the twenty ninth day of November, A. D. one thousand nine hundred thirteen, presented to the foregoing bill of exceptions for settlement and allowance by the Court, in the manner prescribed by law, A. R. Heilig, Esq., attorney for defendants, appearing at said time, and it appearing to the Court, from the orders heretofore made and entered herein, that said bill of exceptions has been heretofore, and within due time,

served on the attorney for the defendants, and that said attorney for defendants has not served or filed any proposed amendments thereto, and said attorney for defendants appearing at this time and agreeing, in open court, that the foregoing bill of exceptions contains a full, true, and correct record of the proceedings in connection with said matter, and this Court being satisfied that the foregoing bill of exceptions is true and correct in all particulars and contains all the material testimony, evidence, exhibits, and other proofs introduced by the respective parties during the hearing of said cause, and the Court being fully advised in the premises, it is ordered that the foregoing bill of exceptions be, and the same is, hereby allowed, settled, approved, and signed as the bill of exceptions for use in said cause, and is hereby made a part of the record, and that the same shall be the bill of exceptions to be used on appeal in the above entitled cause; it is further ordered that the clerk of this Court shall re-file said bill of exceptions as of this date.

Done in open Court at Fairbanks, Alaska, on this twenty-ninth day of November, A. D. one thousand nine hundred thirteen.

*Filed in the District Court.
Territory of Alaska. 4th Div.
Nov 29-13*

F. E. FULLER,

District Judge.

Angus McBride Clerk

[Title of Court and Cause.]

Consent Order for Deposit of Royalties.

The above matter coming on regularly for hearing on the seventeenth day of May, A. D. one thousand

nine hundred twelve, on the application of the plaintiff above named for a continuance of the temporary restraining order hereinbefore granted, pendente lite, at said time appearing Messrs. John A. Clark and Harry E. Pratt, attorneys for plaintiff, and Mr. A. R. Heilig, attorney for defendant, said attorneys, for their respective clients, consenting in open Court that five per cent of the gross output of gold and gold dust and other precious metals and minerals extracted from the Daly Bench on the left limit of Ester Creek, particularly described in the complaint on file herein, shall be deposited by H. C. Hamilton, the layman operating said ground, with the Clerk of this Court during the pendency of this action, and that said Clerk be authorized to convert said gold dust into cash, and the Court being fully advised in the premises,

It is therefore ordered that H. C. Hamilton, layman or lessee of the Daly Bench, situate in the second tier of benches on the left limit of Ester Creek, opposite first tier bench claims Nos. Three and Four Below Discovery on said Ester Creek, after each cleanup hereafter held on said ground, during the pendency of this action, deposit five per cent. of the gross amount of each and every cleanup, said sum being the amount in dispute between plaintiff and defendant, with the Clerk of this Court, to await the outcome of the above entitled action, or until further orders of this Court;

Be it further ordered that the Clerk of this Court be, and he is, hereby authorized to convert all gold

and gold dust so deposited with him by said H. C. Hamilton in the above entitled cause, into cash, and for that purpose he may sell the same to any bank or banker or private individual in the town of Fairbanks, Alaska, at the current market price thereof, and shall hold the proceeds of such sale in lieu of the gold dust itself;

Be it further ordered that the restraining order heretofore by this Court issued in the above entitled cause, wherein defendants are restrained from demanding, receiving, or attempting to collect said five per cent. of the gross output of said Daly Bench, be and remain in full force and effect until further order of this Court.

Done at Fairbanks, Alaska, on this eighteenth day of May, A. D. one thousand nine hundred twelve.

PETER D. OVERFIELD,

District Judge.

O. K.—Heilig.

Entered in Court Journal No. 12, page 9.

Filed in the District Court, Territory of Alaska, 4th Div., May 18, 1912. C. C. Page, Clerk. By H. C. Green, Deputy.

[Title of Court and Cause.]

Order to Deposit Money in Registry of Court.

This matter coming on for hearing, on the application of attorney for defendant for an order requiring the American Bank of Alaska to deposit in the registry of this Court certain moneys deposited with said bank by Henry C. Hamilton, during the season of

1912, as royalties derived from the Daly Bench on Ester Creek, payable to the owner of the interest in said Daly Bench which is in litigation in the above entitled action, and it appearing to the satisfaction of this Court that, shortly after the institution of said action, by stipulation of the attorneys for the respective parties, this Court made an order directing said Henry C. Hamilton to pay into the registry of this Court all royalties derived from the one quarter interest claimed by the defendant Mariam A. Patterson, to await the outcome of this action, and it further appearing to the satisfaction of this Court that said royalties were, by said Henry C. Hamilton, paid and delivered to the American Bank of Alaska, and inadvertently were not paid in to the registry of this Court, but were merely deposited by said Henry C. Hamilton with said American Bank of Alaska for safe keeping, and that, since said time, said gold dust has been converted into money and is now held by said American Bank of Alaska subject to the order of this Court, and it further appearing that said Henry C. Hamilton is, at the present time, absent from the town of Fairbanks and can not personally give directions concerning said gold dust;

Now, therefore, it is ordered that said American Bank of Alaska pay and deliver to the Clerk of this Court money equivalent in value to the amount of the gold dust so deposited with said bank by said Henry C. Hamilton for safe keeping as aforesaid, and that, on the return of said Henry C. Hamilton to Fairbanks, if it is ascertained that any portion of said

gold dust so deposited by him was not properly deposited as royalties from said Daly Bench, said Henry C. Hamilton may apply to this Court for such order concerning the disposition of said money as may be proper in the premises, and that all said money so deposited by said American Bank of Alaska in the registry of this Court be held by the Clerk of this Court subject to the order of this Court.

Done in open Court at Fairbanks, Alaska, on this ninth day of October, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 719.

Filed in the District Court, Territory of Alaska, 4th Div., Oct. 9, 1913. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

**Order Relative to Supersedeas Bond and Cost Bond
on Appeal.**

The plaintiff above named having, on this day in open Court, secured an order for additional time within which to file his bill of exceptions herein, and having announced that he intends to, and will, petition for and prosecute an appeal from the decision and judgment in this action made and entered, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, and having moved the Court for an order, staying proceedings against the plaintiff pending the hearing of

said appeal, and that an order be made, fixing the amount of the security which plaintiff shall be required to give and furnish to stay said proceedings, and for costs on appeal, and having asked that, on the giving of such security, all further proceedings in this Court be suspended and stayed until the determination of said appeal by the said Circuit Court of Appeals for the Ninth Circuit, and said motion on this day having been granted by this Court;

Now, therefore, it is ordered that, on the plaintiff above named filing with the Clerk of this Court a good and sufficient bond, in the sum of one thousand dollars, to the effect that, if the said plaintiff and defendant on appeal shall prosecute his said appeal to effect within the time allowed by law, or shall answer and pay all judgments damages, and costs if he shall fail to make good his said plea, then this obligation to be void, otherwise to remain in full force, effect, and virtue, which said bond shall be approved by the Clerk of this Court, and all further proceedings in this Court in said cause shall be, and they are, hereby suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California;

It is further ordered that said bond, in the sum of one thousand dollars, shall operate both as a supersedeas bond and as a bond on appeal to answer damages and costs, the said amount having been fixed by the Court as sufficient to stay proceedings, for supersedeas, and as bond on appeal.

Done in open Court, at Fairbanks, Alaska, on this ninth day of October, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 718.

Filed in the District Court, Territory of Alaska, 4th Div., Oct. 9, 1913. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Petition for Appeal.

Comes now the plaintiff and feeling himself aggrieved by the judgment and decree of this court, made and entered herein on October 3, 1913, does hereby appeal from said judgment, decree and order, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of error filed herein, and prays that this appeal be allowed and that a transcript of the record, proceedings and papers upon which said judgment, decree and order was made, together with all pleadings and the exhibits annexed thereto, all testimony and proofs adduced in the case and all judgments and orders, interlocutory or final, bill of exceptions, final decree, notice of appeal and assignment of error, duly authenticated, may be sent to the Circuit Court of Appeals at San Francisco, California; and an order be made fixing the amount of the security which appellant shall give and furnish on said appeal, and that on the giving of such

security, all further proceedings in this court shall be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals,

And your petitioner will ever pray.

Dated January 14, A. D. 1914.

McGOWAN and CLARK,

Attorneys for plaintiff.

Due service hereof admitted this Jan. 14, 1914.

A. R. HEILIG,

Attorney for defendants.

Filed in the District Court, Territory of Alaska, 4th Div., Jan. 15, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Assignment of Error.

Comes now the plaintiff in the above entitled cause, being the appellant, and assigns the following error as having been committed by the above named court on the trial of the above entitled action, which error said plaintiff intends to and does rely upon in his appeal to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The Court erred in granting the motion of defendants, at the close of plaintiff's case, to dismiss said action;

2. The Court erred in giving, signing and entering the judgment of date October 3, 1913, in the above entitled action, adjudging that the plaintiff was not entitled to the relief claimed in his complaint, or any

part thereof, and that said action should be dismissed;

3. The Court erred in adjudging that the defendant, Miriam A. Patterson was the owner of the gold dust, or the proceeds thereof, of the value of five thousand one hundred seventy-four and 66-100 dollars (\$5,174.66), which had been impounded to await the outcome of said action;

4. The Court erred in refusing to compel the defendants to proceed with their defense in said action;

5. The Court erred in permitting the defendant H. J. Patterson, over the objections of plaintiff, to testify on cross-examination in regard to any considerations for the deed from H. J. Patterson to Miriam A. Patterson, of date November 27, 1911, prior to the date of the execution thereof, for the setting aside of which said deed, on the ground of fraud, the above entitled action had been instituted,

6. The Court erred in failing to find that the gold dust that had been impounded, under stipulation of the parties to this action to await the outcome of said action, was the proceeds of the lay or lease held by H. J. Patterson, title to which passed to his Trustee after he was adjudged a bankrupt;

7. The Court erred in permitting the defendant H. J. Patterson, over the objection of plaintiff, to testify that the five percent (5 per cent) royalty referred to in the transfer of the lease from Patterson to H. C. Hamilton, was the five percent (5 per cent) which was to accrue to the quarter interest in the Daly Bench Claim, the title to which had been theretofore

vested in H. J. Patterson, prior to the transfer thereof to his codefendant, Miriam A. Patterson;

8. The Court erred in permitting defendants, over plaintiff's objection, to introduce evidence concerning transactions had between the defendant H. J. Patterson and his codefendant Miriam A. Patterson, prior to the 27th day of November, 1911, concerning the considerations for said transfer of said date;

9. The Court erred in permitting the defendants, over plaintiff's objection, to offer in evidence defendants' Exhibit 3, same being an agreement dated September 19, 1910, by and between James Wickersham, of Fairbanks, Alaska, the party of the first part, and H. J. Patterson, of Ester Creek, Alaska, the party of the second part;

10. The Court erred in permitting the defendants, over plaintiff's objection, to introduce evidence concerning the agreement had between H. J. Patterson and James Wickersham and work done thereunder, prior to November 27, 1911;

11. The Court erred in permitting the defendant, over plaintiff's objection, to introduce any evidence concerning the sinking of any holes to bedrock on the Daly Bench Claim, in the year 1910 or in the year 1911, prior to November 27, 1911;

12. The Court erred in permitting the defendant Patterson to testify, over plaintiff's objection, as to who caused the assessment work to be done on the Daly Bench Claim in 1910;

13. The Court erred in permitting any testimony concerning the business dealings between H. J. Pat-

tersen and Miriam A. Patterson, prior to November 27, 1911, and particularly in regard to where she secured the money that was used to pay for the sinking of the holes on said Daly Bench Claim;

14. The Court erred in permitting defendants to introduce, over plaintiff's objection, defendants' Exhibit 4;

15. The Court erred in permitting the introduction of any evidence on the part of the defendants, over plaintiff's objection, of conversations had by the defendant H. J. Patterson with his co-defendant Miriam A. Patterson, prior to November 27, 1911;

16. The Court erred in permitting the defendants to introduce, over plaintiff's objection, defendants' Exhibit 5;

17. The Court erred in permitting defendants to put in their case for the defense, under the guise of cross examination of the defendant H. J. Patterson, after he had been placed upon the stand as plaintiff's witness;

18. The Court erred in its finding in favor of defendants and against plaintiff, for the reason that the evidence was insufficient to justify same and said decision and judgment were contrary to law;

19. The Court erred in rendering judgment against plaintiff for defendants' costs incurred in said action.

20. The Court erred in permitting the defendant Patterson, over plaintiff's objections, to testify in substance as follows:

That the defendant Miriam A. Patterson paid for the assessment work on the Daly Bench for the year

1909, which assessment work was the consideration for the giving of the deed by Jas. Wickersham to H. J. Patterson; that the deed was taken in the name of the defendant H. J. Patterson as a matter of convenience; that he asked Judge Wickersham to make the deed to Mrs. Patterson; that Craig, who did the assessment work on the Daly Bench for the year 1910 was paid therefor by Miriam A. Patterson, as shown by defendants' Exhibit No. 5; that the money received by Mrs. Patterson for paying for such work was secured from H. J. Patterson and Delbert G. Hosler and was the proceeds of a note given by H. J. Patterson and Delbert G. Hosler in Dawson, Yukon Territory, on October 19, 1905, as shown by defendants' Exhibit 4; and that the defendant H. J. Patterson held said property in trust at the solicitation of the defendant Miriam A. Patterson; that said money so loaned to said defendant H. J. Patterson and Delbert G. Hosler was taken from a claim staked by Miriam A. Patterson in the Dawson country and was her separate money; that defendant Miriam A. Patterson kept the royalties and selling price of the property staked by her in the Dawson country as her own separate property;

Also, in permitting him to testify of his conversation with Fred Craig, in which he said "Your money is ready for you whenever the work is finished. Mrs. Patterson is to have the quarter interest. I have a quarter interest for putting—a quarter interest for putting the drill holes down and a lease on all of the ground" and "I says Mrs. Patterson will have the

quarter interest for paying for the drill holes", all of which testimony was drawn from the witness on cross examination and was improper cross examination, for the reason that the matters inquired about were not gone into on direct examination, the only question asked of him concerning the consideration of the deed of November 11, 1912, being whether or not Mrs. Patterson paid him anything on that day.

WHEREFORE, plaintiff prays that the judgment in the above entitled action may be reversed and that he may be allowed the things that he has lost thereby.

McGOWAN & CLARK,

Attorneys for Plaintiff.

Due service of the foregoing assignment of error hereby admitted this 14th day of January, A. D. 1914.

A. R. HEILIG,

Attorney for Defendants.

Filed in the District Court, Territory of Alaska, 4th Div., Jan. 15, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

Order Allowing Appeal and Fixing Amount of Bond.

Now on this 17th day of January, A. D. 1914, the same being one of the judicial days of the General October 1913 Term holden at Fairbanks, Fourth Judicial Division, Territory of Alaska, this cause came on to be heard upon plaintiff's petition for an appeal; and the court being advised in the premises,

IT IS ORDERED that the plaintiff's appeal to the United States Circuit Court of Appeals for the Ninth

Circuit at San Francisco, California, be, and the same is hereby, allowed, upon the execution by appellant of a good and sufficient bond, to be approved by this court, in the sum of two hundred and fifty dollars (\$250.00), said bond to be conditioned as a cost bond on appeal.

Done in open court this January 17, 1914.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 12, page 836.

Due service hereof admitted this January 17, 1914.

A. R. HEILIG,

Attorney for Dfts.

Filed in the District Court, Territory of Alaska, 4th Div., Jan. 17, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Citation on Appeal.

The President of the United States of America, to the above named Defendants and to A. R. Heilig, their Attorney, GREETING:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to an order allowing appeal, made and entered in the above entitled cause, in which Edward Stroecker, as Trustee of the Estate of H. J. Patterson, a Bankrupt, is plaintiff and appellant, and Miriam A. Patterson and H. J. Patter-

son are defendants and appellees, to show cause, if any there be, why the judgment, decree and order made and rendered in said action on October 3, 1913, as in said order allowing appeal mentioned, should not be set aside and reversed and why speedy justice should not be done to said plaintiff in that behalf.

WITNESS the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States of America, on this 14th day of January, A. D. 1914, in the year of our Independence one hundred and thirty-eighth.

Attest my hand and the seal of the above named court, this 17th day of January, A. D. 1914.

F. E. FULLER,
District Judge.

Due service hereof admitted this Jan. 17, 1914.

A. R. HEILIG,
Attorney for defendants.

[Title of Court and Cause.]

Designation of Place for Hearing on Appeal.

To the Hon. Frederic E. Fuller, Judge of the above named Court, and to the Defendants and their Attorney:

Now comes the appellant, and, pursuant to the provisions of the Act of Congress giving the designation of the place of hearing appeals for the Ninth Circuit to the appellant, does hereby designate the city and county of San Francisco, in the State of California, as the place of the hearing of the appeal

in the above entitled action.

McGOWAN and CLARK,
Attorneys for Plaintiff.

Due service hereof admitted this 14th day of
January, A. D. 1914.

A. R. HEILIG,

Attorney for Defendants.

Filed in the District Court, Territory of Alaska,
4th Div., Jan. 15, 1914. Angus McBride, Clerk. By
P. R. Wagner, Deputy.

[Title of Court and Cause.]

Supersedeas Bond.

Know all men by these presents that we, Edward
Stroecker, of Fairbanks, Alaska, as trustee for the
creditors of H. J. Patterson, a bankrupt, as prin-
cipal, and C. J. Hurley and E. R. Peoples, of the
same place, as sureties, are held and firmly bound un-
to Mariam A. Patterson and H. J. Patterson, defend-
ants herein, in the sum of One Thousand Dollars,
lawful money of the United States of America, to be
paid to Mariam A. Patterson and H. J. Patterson,
defendants aforesaid, for the payment whereof, well
and truly to be made, we bind ourselves, our heirs, ex-
ecutors, administrators, and assigns, jointly and sev-
erally, firmly by these presents.

Sealed with our seals and dated this tenth day
of October, A. D. one thousand nine hundred thir-
teen.

Whereas lately, at a District Court for the Terri-
tory of Alaska, Fourth Judicial Division, holden at
Fairbanks, Alaska, in a suit pending in said Court

between Edward Stroecker, as Trustee for the creditors of H. J. Patterson, a bankrupt, as plaintiff,, and Mariam A. Patterson and H. J. Patterson, as defendants, a judgment was by the above entitled Court given and rendered against the plaintiff above named and in favor of the defendants above named, dismissing the action instituted by plaintiff against said defendants and adjudging that the plaintiff was not entitled to the relief demanded in his said complaint, and giving and entering judgment for costs in the sum of....., and adjudging that the defendant Mariam A. Patterson was entitled to receive the sum of five thousand one hundred seventy four dollars sixty six cents' worth of gold dust, that had been ordered to be deposited with the Clerk of this Court, but which had been deposited with the American Bank of Alaska, at Fairbanks, Alaska, to await the outcome of said action, and decreeing that the plaintiff should have ten days within which to file a supersedeas bond in said action, and that, in the event said bond was not filed within said time, that said money, so in the hands of said American Bank of Alaska, should be paid to said Mariam A. Patterson, said judgment having been given, made, and entered in said cause on the third day of October, A. D. one thousand nine hundred thirteen;

And whereas said plaintiff did, on the ninth day of October, A. D. one thousand nine hundred thirteen, obtain an order, extending his time within which to prepare, serve, and have settled his bill of

exceptions, to be used on appeal from the verdict and judgment in this cause to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, to and including the 17th day of November, A. D. one thousand nine hundred thirteen, and having, on the same day, announced that he intends to, and will, petition for an order allowing an appeal from the judgment of said District Court for the Fourth Judicial Division of the Territory of Alaska, as aforesaid, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, and having applied to the Court for an order, fixing the amount of the security which plaintiff shall be required to give and furnish in order to stay proceedings and for costs on said appeal, and the Court having thereupon made its order that, on the plaintiff's filing with this Court a good and sufficient bond, in the sum of One Thousand (\$1000.00) Dollars, to be approved by this Court, to the effect that, if the said plaintiff shall prosecute his said appeal to effect within the time allowed by law and shall answer and pay all judgments, damages, and costs, if he shall fail to make good his said plea, then said obligation to be void, otherwise to remain in full force, effect, and virtue, and that, on the approval of said bond, all further proceedings in this Court shall be stayed and suspended until the determination of said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, and the Court having further ordered that said bond

in the sum of One Thousand (\$1000.00) Dollars shall operate both as a supersedeas bond and a bond on writ of error, and the sum of One Thousand (\$1000.00) Dollars having been fixed by the Court as sufficient to stay proceedings and for said supersedeas and cost bond on appeal;

And whereas the above named plaintiff intends to prosecute said writ of error to said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, to reverse the decision and judgment rendered in the above entitled cause;

Now, therefore, the condition of the foregoing obligation is such that, if the said Edward Stroecker, as trustee for the creditors of H. J. Patterson, a bankrupt, shall prosecute said appeal to effect, or shall answer and pay all damages and costs if he shall fail to make good his said plea on said appeal, then this obligation shall be void, otherwise to remain in full force, effect, and virtue.

And whereas, said plaintiff on appeal desires to stay execution in the above entitled cause, pending the determination of said appeal;

Now, therefore, the further condition of this obligation is such that, if the said Edward Stroecker, as trustee for the creditors of H. J. Patterson, a bankrupt, shall prosecute his said appeal to effect, or shall answer and pay all judgments, damages, and costs, if he shall fail to make good his said plea, then the foregoing bond to be void, otherwise to remain in full force, effect, and virtue.

EDWARD STROECKER, as Trustee, Etc.,
Principal,
By JOHN A. CLARK,
One of His Attorneys.
C. J. HURLEY,
Surety.
E. R. PEOPLES,
Surety.

Territory of Alaska,
Fairbanks Precinct.—ss.

C. J. Hurley and E. R. Peoples being first duly sworn, each for himself and not one for the other depose and say: I am a resident of Fairbanks Precinct, Territory of Alaska, and am one of the sureties named on the foregoing bond; I am worth the sum of One Thousand (\$1000.00) Dollars, to wit, the sum specified as the penalty in said bond, over and above all my just debts and liabilities, in property not exempt from execution and situate within the Territory of Alaska.

C. J. HURLEY.

E. R. PEOPLES.

Subscribed and sworn to before me this tenth day of October, A. D. one thousand nine hundred thirteen.

(Seal)

JOHN A. CLARK,
Notary Public in and for the Territory of Alaska.

My Commission expires on Apr. 24, 1914.

The foregoing bond is approved.

F. E. FULLER,
District Judge.

O. K.—HEILIG.

Inserted per order of Court of Jan. 17, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

Filed in the District Court, Territory of Alaska, 4th Div., Oct. 10, 1913. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS that we, Edward Stroecker, as Trustee of the Estate of H. J. Patterson, a Bankrupt, as principal, and E. R. Peoples and C. J. Hurley, as sureties, are held and firmly bound unto Miriam A. Patterson and H. J. Patterson, the above named plaintiffs, in the sum of two hundred and fifty dollars (\$250.00), to be paid to the said Miriam A. Patterson and H. J. Patterson, their executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 17th day of Jan., A. D. 1914.

WHEREAS the above named plaintiff, Edward J. Stroecker, as Trustee of the Estate of H. J. Patterson, a Bankrupt, has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above entitled cause by the District Court of the United States for the Territory of Alaska, Fourth Division,

NOW, THEREFORE, the condition of this obligation is such that if the above named plaintiff shall prosecute said appeal to effect and answer all costs, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

EDWARD STROECKER, (Seal)

As Trustee for Creditors of H. J. Patterson, Bankrupt.

By JOHN A. CLARK,

One of his Attorneys.

Principal.

C. J. HURLEY (Seal)

E. R. PEOPLES (Seal)

Sureties.

In the presence of

JOHN A. CLARK.

United States of America,

Territory of Alaska.—ss.

E. R. PEOPLES and C. J. HURLEY, being first duly sworn, each for himself and not one for the other, deposes and says: I am a resident of Fairbanks Precinct, Territory of Alaska, and am one of the sureties named on the foregoing bond; I am worth the sum of two hundred and fifty dollars (\$250.00), the sum specified as the penalty of said bond, over and above all my just debts and liabilities, in property not exempt from execution and situated within the Territory of Alaska.

C. J. HURLEY.

E. R. PEOPLES.

Subscribed and sworn to before me this 17th day of Jan., 1914.

(Seal)

JOHN A CLARK,

Notary Public in and for the Territory of Alaska.

My Commission expires Apr. 24, 1914.

Filed in the District Court, Territory of Alaska, 4th. Div., Jan. 17, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Order Extending Time Within Which to Perfect Appeal.

On this day the above entitled cause came on to be heard before the Judge of the above named court, on application of plaintiff for an order extending the time within which to perfect his appeal herein, and the parties appearing by their respective attorneys and it appearing to the satisfaction of the court that the order heretofore made, extending the time within which to file the record herein with the Clerk of the Circuit Court of Appeals at San Francisco, to April 1, 1914, is insufficient for such purpose, now, therefore,

IT IS ORDERED that the time within which said appellant shall perfect said cause upon appeal and docket and file the record thereof in said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is hereby enlarged and extended to and including the first day of May, A. D. 1914.

Done in open court this March 18th, A. D. 1914.

F. E. FULLER.

District Judge.

Due service hereof admitted this March 18, 1914.

A. R. HEILIG,

Attorney for defendants.

Filed in the District Court, Territory of Alaska,
4th Div., Mar. 18, 1914. Angus McBride, Clerk.

Clerk's Certificate to Record.

United States of America,

Territory of Alaska,

Fourth Division.—ss.

I. ANGUS McBRIDE, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing consisting of 155 pages, numbered from 1 to 155, inclusive, constitutes a full, true and correct transcript of the record on appeal in Cause No. 1769, entitled Edward Stroecker, as Trustee of the Estate of H. J. Patterson, a Bankrupt, Plaintiff, vs. Mariam A. Patterson and H. J. Patterson, Defendants, wherein Edward Stroecker, as Trustee, etc., is Appellant and Mariam A. Patterson et al. are Appellees, and was made pursuant to and in accordance with the praecipe of the appellant, filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause and is the return thereof in accordance therewith; and I further certify that this transcript of record was printed and indexed under and by virtue of and in compliance with a "Rule for Printing Records on

Appeal or Writ of Error", made by this court on the 21st day of March, 1914, and that said transcript of record was indexed by me pursuant to said rule, and the stipulation of the parties filed herein, and that the index thereof, consisting of pages i to ii, is a correct index of said transcript of record; also that the costs of preparing said transcript and this certificate, amounting to Fifty-Eight and Fifty-Five One-Hundredths Dollars (\$58.55), has been paid to me by counsel for appellant in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, this twenty-eighth day of March, 1914.

(Seal.)

ANGUS McBRIDE,
Clerk District Court, Territory
of Alaska, 4th Division.

No. 2411.

IN THE
United States Circuit Court of Appeals
 For the Ninth Circuit

EDWARD STROECKER, as Trustee of the
 Estate of H. J. Patterson, a Bankrupt,

Appellant,

vs.

MARIAM A. PATTERSON and H. J.
 PATTERSON,

Appellees.

BRIEF ON BEHALF OF APPELLANT

McGOWAN & CLARK,
 Fairbanks, Alaska,
Attorneys for Appellant.

Filed this.....day of September, 1914.

....., Clerk.

By Deputy Clerk.

No. 2411.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EDWARD STROECKER, as Trustee of the
Estate of H. J. Patterson, a Bankrupt,

Appellant,

vs.

MARIAM A. PATTERSON and H. J.
PATTERSON,

Appellees.

BRIEF ON BEHALF OF APPELLANT

The Case.

This is an action instituted by plaintiff, as Trustee for the creditors of H. J. Patterson, a Bankrupt, against H. J. Patterson and Mariam A. Patterson, his wife, to set aside an alleged fraudulent conveyance made by H. J. Patterson to Mariam A. Patterson, his wife, on November 27, 1911, wherein H. J. Patterson transferred to said Mariam A. Patterson, his wife, an undivided one-fourth interest in and to Placer Mining Claim known as the DALY BENCH, situate, lying and being in the second tier of benches on the left limit of Ester Creek, opposite Creek Placer Mining

Claim No. Three (3) below Discovery on Ester Creek, in the Fairbanks Recording Precinct, Territory of Alaska; and to restrain the defendants from demanding and receiving from a lessee of said ground, five per cent. (5%) of the gross output thereof, claimed by plaintiff as moneys due to the defendant H. J. Patterson, a bankrupt, under and by virtue of a certain sublease from said Patterson to H. C. Hamilton, executed prior to the filing of the petition in bankruptcy by said H. J. Patterson.

On May 11, 1912, the plaintiff filed a complaint in the District Court for the Fourth Judicial Division, Territory of Alaska, alleging that the defendant H. J. Patterson was adjudged a bankrupt by said court on April 16, 1912, and that plaintiff was regularly appointed Trustee for the creditors of said bankrupt on May 4, 1912, and that on November 27, 1911, the defendant H. J. Patterson was insolvent and owing various persons various amounts, in excess of thirty thousand dollars (\$30,000.00); and that he did, on said day, with intent to hinder, delay and defraud his creditors, deed to the defendant Mariam A. Patterson, his wife, an undivided one-fourth interest in the DALY BENCH, on Ester Creek, and that prior to the time of said transfer to his said wife, H. J. Patterson was the owner of a lay or lease covering all of said DALY BENCH, and that prior to the commencement of said action and his adjudication in bankruptcy said H. J. Patterson transferred said lease to H. C. Hamilton; that certain royalties were accruing to the defendant H. J. Patterson under said

lease and were being claimed by Mariam A. Patterson, his wife, by reason of the transfer to her of the undivided one-fourth interest in said ground; and that said Mariam A. Patterson had no right, interest or title in or to said gold or gold dust, or any part thereof, and asking equitable relief (Tr. pp. 4-10).

On May 22, 1912, the separate answer of Mariam A. Patterson was filed, alleging ownership of said property and setting forth that she had acquired title thereto in the year 1910 by furnishing certain funds, with which a hole was sunk to bedrock for the purpose of doing assessment work on said ground for the year 1910, and denying that said transfer to her was in fraud of creditors (Tr. pp. 11-16).

On May 22, 1912, the separate answer of H. J. Patterson was filed, alleging in effect that prior to November 27, 1911, the legal title to said property had been in H. J. Patterson, but that Mariam A. Patterson was the equitable owner thereof, by reason of her furnishing certain funds in the year 1910, with which to perform certain work on the ground, in consideration of which the then owner of the ground was to transfer one-fourth interest to H. J. Patterson for Mariam A. Patterson (Tr. pp. 17-23).

On September 25, 1913, reply of plaintiff to the separate answer of the defendant H. J. Patterson, denying his affirmative allegations, was filed (Tr. pp. 23-24).

On September 25, 1913, reply of plaintiff to the separate answer of the defendant Mariam A. Patterson, denying the affirmative allegations contained in said separate

answer was filed (Tr. pp. 25-26).

On September 26, 1913, the action came on for trial before the Court, sitting without a jury, and was continued from day to day until plaintiff had concluded his case, whereupon a motion was made by the defendants to dismiss the action, and the action was dismissed (Tr. pp. 27-112).

On October 3, 1913, judgment of dismissal was entered by the Court (Tr. pp. 129-131).

On January 14, 1914, petition for appeal was filed by plaintiff (Tr. pp. 138-139).

On January 15, 1914, plaintiff filed his assignment of error (Tr. pp. 139-144).

On January 17, 1914, citation on appeal issued by the District Court for the Territory of Alaska, Fourth Division.

Assignment of Error.

The appellant herein relies upon the following error, viz:

1. The Court erred in granting the motion of defendants, at the close of plaintiff's case, to dismiss said action;

2. The Court erred in giving, signing and entering the judgment of date October 3, 1913, in the above entitled action, adjudging that the plaintiff was not entitled to the relief claimed in his complaint, or any part thereof, and that said action should be dismissed;

3. The Court erred in adjudging that the defendant Mariam A. Patterson was the owner of the gold dust,

or the proceeds thereof, of the value of five thousand one hundred seventy-four and 66-100 dollars (\$5,174.66), which had been impounded to await the outcome of said action;

4. The Court erred in refusing to compel the defendants to proceed with their defense in said action;

5. The Court erred in permitting the defendant H. J. Patterson, over the objections of plaintiff, to testify on cross-examination in regard to any considerations for the deed from H. J. Patterson to Mariam A. Patterson, of date November 27, 1911, prior to the date of the execution thereof, for the setting aside of which said deed, on the ground of fraud, the above entitled action had been instituted;

6. The Court erred in failing to find that the gold dust that had been impounded, under stipulation of the parties to this action to await the outcome of said action, was the proceeds of the lay or lease held by H. J. Patterson, title to which passed to his Trustee after he was adjudged a bankrupt;

7. The Court erred in permitting the defendant H. J. Patterson, over the objection of plaintiff, to testify that the five per cent. (5%) royalty referred to in the transfer of the lease from Patterson to H. C. Hamilton, was the five per cent. (5%) which was to accrue to the quarter interest in the Daly Bench Claim, the title to which had been theretofore vested in H. J. Patterson, prior to the transfer thereof to his co-defendant, Mariam A. Patterson;

8. The Court erred in permitting defendants, over

plaintiff's objection, to introduce evidence concerning transactions had between the defendant H. J. Patterson and his co-defendant, Mariam A. Patterson, prior to the 27th day of November, 1911, concerning the considerations for said transfer of said date;

9. The Court erred in permitting the defendants, over plaintiff's objection, to offer in evidence defendants' Exhibit 3, same being an agreement dated September 19, 1910, by and between James Wickersham, of Fairbanks, Alaska, the party of the first part, and H. J. Patterson, of Ester Creek, Alaska, the party of the second part;

10. The Court erred in permitting the defendants, over plaintiff's objection, to introduce evidence concerning the agreement had between H. J. Patterson and James Wickersham and work done thereunder, prior to November 27, 1911;

11. The Court erred in permitting the defendant, over plaintiff's objection, to introduce any evidence concerning the sinking of any holes to bedrock on the Daly Bench Claim, in the year 1910 or in the year 1911, prior to November 27, 1911;

12. The Court erred in permitting the defendant Patterson to testify, over plaintiff's objection, as to who caused the assessment work to be done on the Daly Bench Claim in 1910;

13. The Court erred in permitting any testimony concerning the business dealings between H. J. Patterson and Mariam A. Patterson, prior to November 27, 1911, and particularly in regard to where she secured the

money that was used to pay for the sinking of the holes on said Daly Bench Claim;

14. The Court erred in permitting defendants to introduce, over plaintiff's objection, defendant's Exhibit 4;

15. The Court erred in permitting the introduction of any evidence on the part of the defendant, over plaintiff's objection, of conversations had by the defendant H. J. Patterson with his co-defendant, Mariam A. Patterson, prior to November 27, 1911;

16. The Court erred in permitting the defendants to introduce, over plaintiff's objection, defendants' Exhibit 5;

17. The Court erred in permitting defendants to put in their case for the defense, under guise of cross-examination of the defendant H. J. Patterson, after he had been placed upon the stand as plaintiff's witness;

18. The Court erred in its finding in favor of defendants and against plaintiff, for the reason that the evidence was insufficient to justify same and said decision and judgment were contrary to law;

19. The Court erred in rendering judgment against plaintiff for defendants' costs incurred in said action;

20. The Court erred in permitting the defendant Patterson, over plaintiff's objections, to testify in substance as follows:

That the defendant Mariam A. Patterson paid for the assessment work on the Daly Bench for the year 1910, which assessment work was the consideration for the giving of the deed by James Wickersham to H. J. Patterson; that the deed was taken in the name of the de-

fendant H. J. Patterson as a matter of convenience; that he asked Judge Wickersham to make the deed to Mrs. Patterson; that Craig, who did the assessment work on the Daly Bench for the year 1910 was paid therefor by Mariam A. Patterson, as shown by defendants' Exhibit No. 5; that the money received by Mrs. Patterson for paying for such work was secured from H. J. Patterson and Delbert G. Hosler and was the proceeds of a note given by H. J. Patterson and Delbert G. Hosler in Dawson, Yukon Territory, on October 19, 1905, as shown by defendants' Exhibit 4; and that the defendant H. J. Patterson held said property in trust at the solicitation of the defendant Mariam A. Patterson; that said money so loaned to said defendant H. J. Patterson and Delbert G. Hosler was taken from a claim staked by Mariam A. Patterson in the Dawson country and was her separate money; that defendant Mariam A. Patterson kept the royalties and selling price of the property staked by her in the Dawson country as her own separate property;

Also, in permitting him to testify of his conversation with Fred Craig, in which he said: "Your money is ready for you whenever the work is finished. Mrs. Patterson is to have the quarter interest. I have a quarter interest for putting—a quarter interest for putting the drill holes down and a lease on all the ground" and "I says Mrs. Patterson will have the quarter interest for paying for the drill holes," all of which testimony was drawn from the witness on cross-examination and was improper cross-examination, for the reason that the mat-

ters inquired about were not gone into on direct examination, the only question asked of him concerning the consideration of the deed of November 11, 1912, being whether or not Mrs. Patterson paid him anything on that day (Tr. pp. 139-144).

Argument.

Section 489, Compiled Laws of Alaska, provides as follows:

“Sec. 489. The property and pecuniary rights of every married woman at the time of her marriage or afterwards acquired by gift, devise, or inheritance shall not be subject to the debts or contracts of her husband, and she may manage, sell, convey, or devise the same by will to to the same extent and in the same manner that her husband can property belonging to him.”

Section 497, Compiled Laws of Alaska, provides as follows:

“Sec. 497. A married woman possessed of or owning any personal property or pecuniary rights may make a descriptive list of the same, and make and subscribe on the said list an oath that the property and rights therein described belonged to her at the time of her marriage, or that she has acquired the same by her own labor, or by bequest, inheritance, or by the gift of some person named other than her husband; and the list and affidavit shall be recorded in the register, and shall be prima facie evidence of the facts therein stated, and property not so registered shall be deemed prima facie to be the property of the husband rather than of the wife.”

Section 439, Compiled Laws of Alaska, provides as follows:

“Section 439. When property is owned by either

husband or wife, the other has no such interest as will make the same liable for the contracts or liabilities of either the husband or wife who is not the owner of the property, except as herein provided."

Section 443, Compiled Laws of Alaska, provides as follows:

"Sec. 443. Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, and, except as herein otherwise provided, they are not liable for the separate debts of each other, nor is rent or income of such property liable for the separate debts of the other."

Section 550, Compiled Laws of Alaska, provides as follows:

"Sec. 550. All deeds of gift, all conveyances, and transfers of assignments, verbal or written, of goods and chattels or things in action, made in trust for the person making the same, shall be void as against the creditors, existing or subsequent, of such person."

Section 556, Compiled Laws of Alaska, provides as follows:

"Sec. 556. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods, or things in action, or of any rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded shall be void."

Section 559, Compiled Laws of Alaska, provides as follows:

"Sec. 559. The question of fraudulent intent in

all cases arising under the provisions of this code shall be deemed a question of fact, and not of law."

Section 560, Compiled Laws of Alaska, provides as follows:

"Sec. 560. The provisions of chapters thirteen, fourteen, and fifteen of this title shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

I.

THE PLAINTIFF, AT THE CLOSE OF HIS CASE, HAD ESTABLISHED A PRIMA FACIE CASE, AND THE BURDEN WAS UPON THE DEFENDANTS TO ESTABLISH THAT THE TRANSFER FROM H. J. PATTERSON TO MARIAM A. PATTERSON WAS MADE (a) IN GOOD FAITH, (b) FOR A VALUABLE AND ADEQUATE CONSIDERATION, AND THE COURT ERRED IN DISMISSING PLAINTIFF'S ACTION.

Appellant established the following facts:

That in the month of September, 1910, H. J. Patterson entered into an oral agreement with James Wickersham, the owner of the DALY BENCH, whereby said Wickersham agreed that if H. J. Patterson would "bore, dig or excavate *one* hole to bedrock" on said claim, for the purpose of doing the assessment work on said claim for the year 1910, said Wickersham would deed to said H. J. Patterson an undivided one-quarter interest in and to said claim (Tr. pp. 82-83), and that said Patterson was to have a lay or lease on said ground when said work was completed;

That thereafter, and on September 19, 1910, said agreement was reduced to writing and the terms and conditions of the lay under which said Patterson was to work were explicitly set forth (Tr. pp. 121-128);

That said lease particularly provided as follows:

"In consideration of the sinking of *a hole from the surface to bedrock thereon*, for the purpose of prospecting said ground and determining its value, by the party of the second part (Patterson), at his own expense, the party of the first part (Wickersham) does hereby agree to make, sign and deliver to the party of the second part his quit claim deed to an undivided one-quarter interest in said premises; the party of the second part undertakes hereby, in consideration of said agreement and transfer, to sink said hole upon the said premises and to do the assessment work for the year 1910, without any expense whatever to the party of the first part" (Tr. p. 122).

Also:

"To enter upon said demised premises, within a reasonable time after the signing and sealing of these presents, and to dig, excavate, bore or otherwise sink *one hole from the surface to bedrock upon said claim*, for the purpose of prospecting said ground and doing the assessment work for the year 1910" (Tr. p. 123).

Also:

"And the party of the second part further agrees to enter upon said premises within a reasonable time after the signing of these presents and proceed to work the same in a minerlike manner, with due regard to the development, preservation and value of said demised premises * * * to work and mine said demised premises steadily and continuously from the date hereof until the termination of this lease," etc. (Tr. pp. 123-124).

In pursuance of said agreement, Patterson performed the assessment work and the conditions for obtaining title, by drilling *one* hole to bedrock, at a depth of one hundred feet, at an expense of one hundred dollars (\$100.00), said drilling costing one dollar (\$1.00) per foot (Tr. p. 82).

Thereafter Patterson caused a *second* hole to be put to bedrock, to a depth of one hundred and twenty-five feet (Tr. p. 56), and the prospects not being satisfactory, abandoned the lease and went to work elsewhere (Tr. p. 62).

In 1911, Wagner, Beegler, Wichman and Wheeler asserted ownership of the greater portion of the DALY BENCH, by reason of their ownership of the HAPPY HOME Association Claim, located in 1908, adjoining the DALY BENCH and overlapping the same (Tr. p. 59), and when Wickersham returned to Fairbanks they were in possession of the ground, and after some negotiations the difficulties were adjusted, and on November 8, 1911, an agreement of compromise was entered into by and between Wagner, Wichman, Wheeler and Beegler, owners, and E. M. Horner, lessee of the HAPPY HOME Association Claim, the parties of the first part, and James Wickersham and H. J. Patterson, the parties of the second part, adjusting lines between said properties and settling all matters in dispute between the rival claimants for the ground (Tr. pp. 92-95), and reciting:

“And in consideration of the conveyance to them (Wagner and associates) of seventy-five feet strip hereinafter made by the parties of the second part

to the parties of the first part, the parties of the first part do hereby sell, assign, set over and quit claim to the parties of the second part, in the proportions as they now claim the same, the whole of the ground within the said PAT DALY Claim, as shown in said C. E. Davidson survey of September 29, 1911; and in consideration of such conveyance to them, the parties of the second part do hereby sell, assign, set over and quit-claim to the parties of the first part, in the proportions as they now claim the same, a strip of ground off the upper end of the PAT DALY Claim, running up and down the general course of Ester Creek * * *. The parties of the second part agree that the parties of the first part may permit the water and tailings from the said seventy-five foot strip and the land immediately adjacent and above, where said E. M. Horner is now working, to flow upon said DALY Claim," etc. (Tr. p. 94).

This agreement was filed for record November 10, 1911, in the office of the Recorder for Fairbanks Recording Precinct.

On October 12, 1911, James Wickersham executed another lease to H. J. Patterson, covering the whole of the DALY BENCH, which said lease (Tr. pp. 112-121) contains, among other provisions, the following:

"That the party of the first part is the owner of an undivided three-fourths interest in and the party of the second part is the owner of an undivided one-fourth interest in that certain mining claim known as the DALY BENCH, situate," etc. (Tr. pp. 112-113).

Also:

"That the party of the second part has applied for and the party of the first part hereby gives to

the party of the second part a lease upon said claim, in consideration of the terms and covenants of this lease, and also in consideration of the terms and agreements contained in that certain other contract, signed between these parties at the same time as this lease, which other agreement is as much a part of this agreement of lease as if written in its body. In consideration of the rents, royalties, covenants and agreements hereinafter reserved and by said party of the second part to be kept, paid and performed, and in consideration of the performance of the other mentioned agreement, of even date herewith, the party of the first part does hereby grant, demise, let and lease unto the second party, the party of the second part does hereby accept the lease of the whole of said premises, together with all appurtenances and the right and privilege to prospect and mine the same and to extract therefrom all the gold and gold bearing placers therein contained, subject to the terms of this agreement" (Tr. p. 113).

Said lease was from date thereof until October 12, 1915. Said lease also contains the following paragraph:

"As part consideration of this lease the party of the second part agrees that *his undivided one-fourth* interest in said premises shall be covered and included in the terms of this lease and *shall also at all times be subject to the debts, defaults or damages resulting from the working under this lease, or for violation thereof, and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto,* and all subject to the terms of this lease; and it is especially agreed that the party of the first part shall have a *first lien upon the whole of the output of the whole of the Daly claim, including the undivided one-fourth interest of the party of the second part* for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease" (Tr. p. 114).

Patterson also agreed:

"To enter upon the said demised premises wit(hin?) thirty days after the signing of these presents and begin and thereafter continuously maintain possession and mine the said mining claim in a good and minerlike manner with due regard to the development, preservation and value of the same as a mining claim," etc. (Tr. pp. 114-115).

And:

"The party of the second part further agrees that his undivided one-fourth interest shall be held liable to the party of the first part for all liens or other claims made or adjudged against said property which shall in any way become a charge upon the interest of the party of the first part" (Tr. p. 116).

Also:

"And the party of the second part does hereby specially agreed not to assign this lease or lay or any interest therein or thereunder and not to sublet or sublease said demised premises or any part thereof; *nor to permit the same nor any part thereof nor any interest therein to pass to any other person whatever without the written consent of the party of the first part had and obtained, and this prohibition shall extend to the undivided one-fourth interest belonging to the party of the second part as fully as to the interest belonging to the party of the first part*" (Tr. p. 118).

Said lease was filed for record on the 10th day of November, 1911, in the office of the Recorder of Fairbanks Recording District (Tr. p. 121).

The conditions of the lease were discussed between H. J. Patterson and his wife, both previous and subsequent to the execution thereof (Tr. pp. 96-97).

On October 14, 1911, James Wickersham made, exe-

cuted and delivered to H. J. Patterson a deed conveying to said Patterson an undivided one-fourth interest in and to the DALY BENCH (Tr. pp. 86-87), and said deed was filed for record by H. J. Patterson on November 10, 1911, in the office of the Recorder of Fairbanks Precinct. Said deed contains the following recital:

“Said conveyance is made in consideration of the doing of the assessment work thereon by the vendee in the year 1910, in compliance with the United States Statute” (Tr. pp. 86-87).

H. J. Patterson was mining on Engineer Creek and was indebted to various laborers and other creditors, for supplies furnished in the sum of over thirty-two thousand dollars (\$32,000.00) Tr. p. 27). The only other property owned by said Patterson at said time was a lease or lay on the LAST CHANCE Association Claim on Engineer Creek, of unknown value, and certain personal property and accounts receivable, of the value of but a few thousand dollars and entirely insufficient to pay his indebtedness. He also owned undivided interests in certain placer association claims of no known value, and commonly called “wild cats” (Tr. pp. 28, 29, 30). In the summer of 1911, pay had been struck on the HAPPY HOME Association Claim, just above the DALY BENCH, and the DALY BENCH Claim had a market value of approximately ten thousand dollars (\$10,000.00) (Tr. pp. 32-33), and stood a chance of having considerably greater value. During the summer of 1911, after pay had been struck by Horner & Company, lessees of the HAPPY HOME, Patterson told John R. Junkin,

one of his employes, that he owned a quarter interest in the DALY BENCH "just by where Horner struck the pay" (Tr. p. 101).

In the month of August, Patterson had another talk with his employe, Junkin, concerning the property, concerning which Junkin testified as follows:

"He was talking about opening up that ground over there, and he talked to me about going over later in the season. Q. Did he say anything more? A. Well, first he asked me if I would go over and look after his interest there in the lay, if he should make final arrangements to carry the lay through. And afterwards he told me that he couldn't finance the lay, but he asked me if I wanted the lay. In fact I had asked him if I could have a lay on the upper end of the claim. He asked me if I could finance it, and I told him I could, and he promised to give me the lay, and later on he told me he couldn't give it to me. Q. Did you have any more conversations concerning that bench? A. Yes, he talked about it quite often. Afterwards, I think in the latter part of October, or early in November, one day Mr. Peoples was out there (interrupted) Q. What was Mr. Peoples' purpose there, if you know? A. I had an idea, but I didn't know for a fact. But Mr. Patterson did tell me that Peoples was out there and was pressing him for money. Q. Was what? A. Was pressing him for money. Q. Yes? *And he said if they kept on pressing him that he would put the Eva Creek property in his wife's name, and would let Mr. Peoples and the rest of his creditors do whatever they liked about it. But he said that he would guarantee the men's wages out of the Eva Creek property, provided he couldn't make the Last Chance Association lay pay.* Q. When you said 'Eva Creek property,' what property was mentioned? A. The Daly Bench. Q. Did he use the terms in-

terchangeably, the Eva Creek property and the Daly Bench? A. Sometimes he called it the Daly Bench and sometimes the Eva Creek property. Q. What did he say then? A. *I asked him why he hadn't it in his wife's name long ago if he expected they were going to make trouble for him. He said if he put it in his wife's name it would hurt his credit still further*" (Tr. pp. 102-103).

Mr. Junkin also testified that Mr. Patterson had told him that he had a lay on the whole bench and a quarter interest in the property—"a seventy-five per cent. lay on the whole bench besides—in addition to a quarter interest in the property" (Tr. p. 104).

In the month of November, Patterson was indebted to E. R. Peoples, a merchant of Fairbanks, in the sum of about four thousand dollars (\$4,000.00), and on about the 15th of November, Peoples had received a check from Mr. Patterson for one thousand dollars (\$1,000.00) and was unable to get it cashed (Tr. p. 105). Mr. Peoples ascertained that the transfer had been made from James Wickersham to Mr. Patterson of an undivided one-fourth interest in the DALY BENCH (Tr. p. 106) and asked Patterson to give him security on the DALY BENCH to insure the payment of his merchandise claim, and Patterson informed him that through an arrangement with Mr. Wickersham he couldn't give any security on the ground or transfer it in any manner (Tr. p. 107). Mr. Peoples testified in part as follows:

"Q. What did you say to him; remember, as near as you can, the words you used to him in asking for security? A. I suggested to him that he had a

quarter interest in that, and he should put it up as security (Daly Bench). Q. Did he deny that he had a quarter interest? A. No, sir. Q. The reason he gave you for not putting it up was that he had a written agreement—(interrupted). A. With Judge Wickersham. Q. (continuing)—with Judge Wickersham whereby he couldn't incumber it? A. Yes, sir" (Tr. pp. 107-108).

After the transfer was made, on November 27, 1911, by Patterson to his wife, Peoples instituted a suit against Patterson for the amount of his account, and thereafter instituted an action to set aside the conveyance to his wife, which action was abandoned after the Trustee in Bankruptcy was appointed (Tr. p. 108). On November 27, 1911, H. J. Patterson executed a sublease or assignment of the lease or lay held by him on the DALY BENCH to one H. C. Hamilton, transferred to Hamilton all his interest in the lay that he had from James Wickersham, reserving to himself five per cent. (5%) of the gross mineral output thereof (Tr. pp. 39-42). In the said assignment or sublease it is recited:

"That the said H. J. Patterson does hereby lease, demise and sublet unto the said H. C. Hamilton all of the placer mining claim above described, including all his right, title and interest therein held by the said H. J. Patterson as lessee of the said Wickersham *and in his own right as owner of an undivided one-fourth part of the title to said mining claim*, to have and to hold unto the said H. C. Hamilton for and during the term commencing this day and ending October 12, 1915" (Tr. p. 40).

subject to the terms of the Wickersham lease, and obligating Hamilton as follows:

"And (Hamilton) shall pay in addition thereto

five per cent of the gross amount of each and every cleanup of gold and gold dust made by him upon said premises to the said H. J. Patterson" (Tr. p. 41).

On the evening of the same day, Patterson made and executed a deed from himself to Mariam A. Patterson (Tr. pp. 34-36), for the recited consideration of one dollar (\$1.00) of "all his right, title and interest, being an undivided one-fourth interest of, in and to that certain bench placer mining claim, situate in Fairbanks Precinct, Alaska, on the left limit of Ester Creek, and known as the PAT DALY Bench Placer Mining Claim, etc. (Tr. p. 35). There is no assignment in said deed of the rents, issues and profits, and only the bare land is transferred, save and except that the *habendum* clause is as follows:

"To have and to hold same, together with the appurtenances and improvements thereon, to and unto the said party of the second part, her heirs and assigns forever" (Tr. p. 35).

No assignment was ever made to Mariam A. Patterson of the lay or sublease between Hamilton and H. J. Patterson, nor were the rents, issues and profits, or any of the mineral products of said DALY BENCH assigned to the defendant Mariam A. Patterson.

At the time of the execution of deed to her, Mrs. Patterson was not present. The deed was prepared by Mr. Erwin, as attorney for H. J. Patterson, and filed for record by him, and Mrs. Patterson knew nothing of the execution thereof until the return of Mr. Patterson to Engineer Creek (Tr. pp. 98-99), and no consideration was paid by Mrs. Patterson to H. J. Patterson at the

time of the execution of said deed.

Prior to the assignment of the lease to Mr. Hamilton, H. J. Patterson had spent considerable money on the lay on the DALY BENCH, and *after the transfer to Hamilton, Patterson continued spending money in sinking a shaft on said ground, until the month of January, 1912, amounting in all to over fourteen hundred dollars (\$1,400.00) (Tr. pp. 99-100).* None of this money was Mrs. Patterson's and all was expended by Patterson under his lease from Wickersham (Tr. p. 100). The lease was valuable at that time (Tr. p. 100), but Patterson alleges that there was no consideration for the assignment to Hamilton (Tr. p. 100).

On November 28, 1911, Patterson assigned to certain of his creditors the lease or lay held by him on the LAST CHANCE Association Claim on Engineer Creek (Tr. pp. 38-39).

The plaintiff alleged in his complaint (Tr. p. 7) that if the defendants were not restrained from demanding from Hamilton the royalties due under the lease with H. J. Patterson, said "defendants Mariam A. Patterson and H. J. Patterson will demand and receive from said H. C. Hamilton said five per cent of said gross output, unless restrained by this court," and that allegation is not denied by the answer of either defendant.

On April 16, 1912, more than *four months* after the execution of the deed by H. J. Patterson to his wife, said H. J. Patterson filed a voluntary petition in the District Court, Fourth Division, Territory of Alaska,

to be, and he was by said Court adjudged a bankrupt on April 16, 1912 (Tr. p. 4), and thereafter plaintiff, in the case at bar, was duly appointed Trustee for the creditors, qualified as such, entered upon the discharge of his duties, and instituted this action on May 11, 1912, to set aside the transfer from H. J. Patterson to Mariam A. Patterson, to have an adjudication of the Court that Mariam A. Patterson held the ground in trust for H. J. Patterson and his creditors, and to restrain the collection by the defendants of the royalties due from H. C. Hamilton, and for other relief (Tr. pp. 4-10).

After said H. J. Patterson was adjudged a bankrupt, while being examined before the Referee in Bankruptcy, he stated that he had caused the hole to be sunk to bed-rock on the DALY BENCH in the year 1910 and had caused the assessment work to be done thereon, for which services he received a deed to an interest in the DALY BENCH (Tr. p. 79).

The plaintiff also established that said H. J. Patterson had worked several pieces of mining ground in the Fairbanks district and had made a failure of all of them but one, and in most cases, when he quit work, he was indebted to various persons (Tr. pp. 69-70-71-73-74), and lived on credit (Tr. p. 73).

The defendant H. J. Patterson was called as a witness for plaintiff, and upon cross-examination was permitted to testify, over plaintiff's objection, that in the year 1905, while H. J. Patterson and one Hosler were engaged in mining in the Dawson country, in the Yukon Territory, Mrs. Mariam A. Patterson staked a mining

claim in her own name, with the assistance of her husband (Tr. p. 66), and that from royalties received therefrom she loaned to her husband and Hosler the sum of five hundred dollars (\$500.00), and took from said Patterson and Hosler their promissory note in the sum of five hundred dollars (\$500.00) (Tr. p. 53); that in the year 1910 Patterson and Hosler were mining on Ready Bullion Creek, in the Fairbanks District, and from the proceeds of their mining operations, after a settlement between Patterson and Hosler, they each paid to her three hundred dollars (\$300.00), which she deposited in bank (Tr. p. 75); and that afterwards and on September 21, 1910, she gave Fred Craig a check for two hundred twenty-five dollars (\$225.00), to pay for the work he had done on the DALY BENCH under the agreement between Patterson and Wickersham, wherein Wickersham agreed that for the performance of one hundred dollars' worth of work he would give Patterson a deed to a one-fourth interest therein (Tr. pp. 56-57); and that the deed from Wickersham to Patterson of a one-fourth interest in said claim was in reality for her. Patterson admitted that his agreement with Mrs. Patterson was that she would sink *one* hole to bedrock and be entitled to a quarter interest in said DALY BENCH (Tr. p. 82). The note given by Hosler and Patterson and the check signed by Mrs. Patterson to Craig were both admitted in evidence over plaintiff's objection.

The explanation of the reason why H. J. Patterson had said note in his possession, after he alleged it had

been paid, was that in the summer of 1910 Hosler paid Mrs. Patterson three hundred dollars (\$300.00) and Patterson deposited to her account in the Washington-Alaska Bank three hundred dollars (\$300.00) a few days thereafter; that the note was delivered to Hosler, but was not marked paid, and when asked why it was not marked paid, he answered:

"I don't know. We got up and went away and probably overlooked it. He didn't take it with him, something of that kind. Q. When did you get this from Hosler? A. When? Q. This note? A. It was left at the house. Q. I thought you said the note was delivered to Hosler when he paid. A. It was, right there. The settlement was in our cabin and in some way in taking his papers home the thing was left there somehow, I don't know. I noticed it afterwards and put it away with the papers" (Tr. pp. 75-76).

The above is a summary of the testimony that was given in behalf of the defendants under cross-examination of Patterson, except that Patterson was permitted, over the objection of the plaintiff, to testify in regard to statements made by him to Wickersham and to Craig and to recite conversations between himself and his wife, and he stated that he had informed Judge Wickersham that the quarter interest was for his wife, that she was paying for it, and that Judge Wickersham told him he could deed the property to his wife at any time (Tr. p. 62). But the testimony showed that by the terms of the lease accepted by said Patterson from Wickersham, in November, 1911, he expressly covenanted that the property should not be transferred to any person whomsoever,

without the written consent of Wickersham, and made the interest liable for the complete fulfillment of the term of said lease with Wickersham (Tr. p. 114).

It was admitted that Hosler's attendance had not been secured to testify in the trial, nor was his deposition taken, although he was at Hot Springs, distant but one hundred miles from Fairbanks. Mr. Patterson was *not* sworn and no evidence of good faith of the transaction between himself and his wife was introduced, save and except as above set forth.

Plaintiff submits that he established a *prima facie* case, as it was only necessary for plaintiff to establish the fact of the transfer, the insolvency of the grantor at the time said transfer was made, and that existing creditors of the grantor were prejudiced by reason of said transfer, and the burden was then placed upon the defendants to establish the good faith of the transaction and that it was for a valuable and an adequate consideration.

Wright et al. vs. Craig et ux (Or.) 66 Pac. 807.

Marks vs. Crow (Or.) 13 Pac. 55.

II.

THE CONVEYANCE FROM H. J. PATTERSON TO HIS WIFE WAS VOLUNTARY FOR THE DIFFERENCE BETWEEN THE CONSIDERATION ACTUALLY PAID (IF ANY WAS PAID) AND THE VALUE OF THE PROPERTY CONVEYED.

A. & E. Encyc. of Law, 2d Ed. Vol. 14, p. 299;

Bullitt v. Worthington, 3 Md. Ch. 99;

Bates et al. v. McConnell et al., 31 Fed., 588.;

Clements et al. v. Nicholson et al., 6 Wallace

(U. S.) 316; 18 Law Ed., 786;
 Mechem on Sales, Sec. 597;
 Snyder v. Partridge (Ill.), 29 N. E., 851, 32 Am.
 St. R. 130;
 Strong v. Lawrence (Ia.) 12 N. W., 74;
 Norton v. Norton, 5 Cush. (Mass.) 524;
 Church v. Chapin, 35 Vt., 223;
 Robinson v. Steward, 10 N. Y., 189.

If Mrs. Patterson actually did pay one hundred dollars (\$100.00) as a consideration for the transfer of the property to her, the most she would be entitled to receive from the proceeds of the sale of the land would be the amount of the consideration so paid, and the balance should be delivered to plaintiff for the payment of the debts of the bankrupt.

Wright et al. v. Craig et ux., 66 Pac. 807-810.

Lyon v. Zimmer, 30 Fed. 401-411.

Wright v. Shoudy et al. (Wash.), 42 Pac. 631.

III.

BY REASON OF THE CONFIDENTIAL RELATIONS EXISTING BETWEEN HUSBAND AND WIFE, TRANSACTIONS BETWEEN THEM, WHEREBY CREDITORS ARE INJURED, ARE CLOSELY SCRUTINIZED, AND THE BURDEN WAS ON MRS. PATTERSON TO ESTABLISH THAT THE TRANSACTION WAS IN GOOD FAITH AND FOR A VALUABLE AND ADEQUATE CONSIDERATION.

See:

Bank of Colfax v. Richardson (Ore.) 54 Pac.,
 359-366.

In Wright et al. v. Craig et ux., 66 Pac., 807, in an

action to set aside a conveyance as fraudulent, plaintiff established the insolvency of the defendant and introduced a deed from defendant to his wife, reciting a consideration of one dollar (\$1.00), and also the judgment obtained against defendant, grantor. *Held* to make a *prima facie* case of fraud and to place the burden on the wife to show that she accepted the conveyance on a consideration and without intent to defraud her husband's creditors.

See also *Marks v. Crow* (Ore.), 13 Pac., 55, where the court required the grantees to establish by satisfactory proof that there was a valuable and *adequate* consideration for the deed.

See also 14 A. & E. Encyc. of Law, 2d Ed., 292.

In the case of *Jennings v. Lentz* (Ore.), 93 Pac., 327, the court holds that it has become a settled rule in that state that in suits in equity, the claim of a *bona fide* purchaser for value is an affirmative defense which must be pleaded, thereby placing the burden of proof, in such cases upon the party relying thereon. *Id.* 329.

In *Helm v. Brewster et al.* (Colo.), 93 Pac., 1101, the Court holds:

"In an action by a creditor of a husband, to set aside conveyances to the wife, the burden is on the husband and wife to clearly establish that the transaction is honest, and without intent to hinder and defraud such creditor. A sale of property, though for a full consideration, made by the owner with intent to hinder, delay and defraud his creditors, if the vendee participated in such intent, is void as against such creditors. A grantor's intent to hinder, delay and defraud his creditors may be inferred from facts and circumstances."

In discussing the rule established in said case, the Court, by Gabbert, J., on page 1104, says the reason for the rule is that the relationship of husband and wife affords exceptional opportunities for the former to defraud his creditors by conveying his property to his wife, and as they are generally the only persons who know of the transactions between themselves, the rule may be even stronger than above indicated.

In the case of *Stubling v. Wilson* (Ore.), 90 Pac., 1011, the court holds: that where conveyance by a debtor to his brother is attacked as fraudulent to the creditor, the burden is on the *grantee* to prove that he purchased *without notice of the fraudulent intent* and for a valuable consideration.

In the case at bar, the evidence clearly shows that the defendant H. J. Patterson transferred his property to prevent his creditors from securing same, and *no attempt was made to prove that his wife was not cognizant of his fraudulent intent.*

In the same case, on page 1012, the Court, citing the case of *Mendenhall v. Elwert*, *supra*, says that the law will presume that such relative was aware of the fraudulent intent of the grantor, and proceeds to say:

“By virtue of the relations of the parties, the fraudulent intent of the debtor being established, the transaction is looked upon with suspicion and *the burden is shifted and cast upon the grantee to allege and show consideration and want of notice*, the evidence of both of these matters being peculiarly within the knowledge and control of such grantee and not accessible to plaintiff, and *if not produced it*

will be considered as due to inability to show such facts."

In case of First. Nat. Bank of Albuquerque v. McClellan (New Mexico), 58 Pac., 347, the Court says (p. 349) :

"The fact that the whole of the husband's estate is conveyed to the mother-in-law, who thereupon conveys to the wife, being shown, the burden of proof was upon the wife to overcome the presumption of legal fraud arising therefrom, and to show that the conveyance was for a valuable and adequate consideration out of her separate estate (citing authorities), and she must go even further and show the good faith of the transfer."

To the same effect:

Knapp v. Day (Colo.), 34 Pac., 1008.

In the case of Weber v. Rothchild (Ore.), 15 Pac., p. 650, on page 653, the Court says:

"Another rule of law equally elementary, which is frequently applied in such cases (fraudulent conveyances), is that when a fact is peculiarly within the knowledge of a party, he must furnish the necessary evidence of such fact.

In Mendenhall v. Elwert et al. (Ore.), 59 Pac., 805, it is held:

"Where a debtor conveys his property to a relative and his creditor sustains any loss in consequence thereof, such relationship imposes upon the parties to the conveyance the burden of showing that the transfer was made in good faith and for a valuable consideration."

The Court, further commenting on the case, says:

"Whatever the rule may be in regard to the burden of proof, in suits to set aside for fraud, conveyances executed by grantor who is not related to the grantee, the point insisted upon can have no ap-

plication to the case at bar, in which the *onus probandi*, by reason of such relation, is cast upon the defendants to show the *bona fides* of the several transactions and to supplement their testimony by the evidence which was more particularly within their knowledge and power to produce." Id. 808.

In *Goodale v. Wheeler et al.* (Ore.), 68 Pac., 753, the Court declares the rule herein contended for to be the rule by which the Supreme Court of Oregon is governed. Id. 756.

In *Tibbets v. Terrill et al.* (Colo.), 96 Pac., 978, it is held:

"The utmost fairness is required in dealings between husband and wife, so far as they affect the right of creditors, and they are ordinarily bound, whenever a transaction between them is impeached or attacked, to show in the fairest and most favorable light an honesty of purpose and an absence of all intent to hinder or defraud those who may be creditors of the husband."

See also:

Bump on Fraudulent Conveyances, pp. 282, 287, 288;

Ogden St. Bank v. Barker, 40 Pac., 765-767;

Gustin v. Mathews (Utah), 70 Pac., 402;

Judson v. Lyford (Cal.), 24 Pac., 286-288;

Callan et al. v. Statham et al., 64 U. S., 481; 16 Law Ed., 532.

Also see note 56 L. R. A., 825;

Also *Stevens v. Carson* (Neb.), 9 L. R. A., 523.

Murray v. Shoudy (Wash.), 42 Pac., 631-632.

IV.

IF A MARRIED WOMAN DESIRES TO PRESERVE HER PROPERTY RIGHTS, SHE SHOULD TAKE REASONABLE CARE TO KEEP IT SEPARATE AND IN SUCH CONDITION AS NOT TO MISLEAD THOSE DEALING WITH HER HUSBAND.

Knowlton et al. v. Mish., 17 Fed. 198;

Humes, Assignee of Scruggs, Bankrupt, v. Scruggs et al., 94 U. S., 28; 24 Law Ed. 51.

In the case of Brown v. Whittington (Ore.) 64 Pac., 649-650, Bean C. J. says:

“But whatever may have been the real facts in reference to the matter, the Coos County land was purchased by Whittington and the title taken in his own name. He was afterwards allowed and permitted to sell a portion thereof, mortgage the remainder and otherwise deal with it as his own, until after one of his neighbors, relying on the apparent fact that he was owner, became surety for him on the note to Brown. It would be manifestly inequitable and unjust, under such circumstances, to permit the conveyance as against such a surety to stand, unless clearly shown by the evidence to have been made and received in good faith.”

In a case similar to the case at bar, where the wife claimed that she furnished, from her personal funds, the money with which to purchase a hotel, and permitted the husband to hold himself out to the world as the owner thereof, the court holds:

“Where a husband, with the knowledge and consent of the wife, holds himself out to the world as the owner of property, and where the record title is allowed to remain in him, and he obtains credit by reason of such supposed ownership * * * the

proof of ownership in the wife should be most clear, satisfactory and convincing, *if indeed it can prevail at all against the rights of bona fide creditors.*"

Frederick et al. v. Shorey et ux. (Wash.), 29 Pac., 766-767.

In the case of McKinney et al. v. Ward et al. (Kan.), 18 Pac., 196, the Court says:

"If, however, it is once shown that, even if the property did belong to the defendant, she, in her dealings with her husband allowed him to use and control the property in such manner as to lead or induce a prudent business man to trust him upon the strength of such dealing and handling of property, then, in that case, she could not be heard to complain." Id. 197.

In the case at bar, that is precisely what Mrs. Patterson permitted her husband to do.

See also: Brummet v. Weaver, 2 Ore., 173-174.

V.

MINING PROPERTY ACQUIRED BY MRS. PATTERSON DURING COVERTURE IS NOT EXEMPT FROM SEIZURE FOR HER HUSBAND'S DEBTS, UNDER THE LAWS OF ALASKA.

Section 489, Compiled Laws of Alaska, holds that property acquired by a wife after marriage, by gift, devise or inheritance, shall not be liable for her husband's debts. The property from which the defendant Mariam A. Patterson is alleged to have received royalties, with which she paid for the work on the DALY BENCH, by reason of which she claims ownership thereof, was acquired by the location of a placer mining claim in the Dawson country, with the assistance of her husband. It

was not acquired by "gift, devise or inheritance" and was a *purchase*. *Purchase* is defined as "the acquisition of property by a party's own act as distinct from acquisition by act of law."

32 Cyc., 1266.

VI.

A MARRIED WOMAN CLAIMING PROPERTY PURCHASED AFTER MARRIAGE, IN OPPOSITION TO HER HUSBAND'S CREDITORS, MUST SHOW THAT THE CONSIDERATION WAS PAID OUT OF HER SEPARATE ESTATE. HER EARNINGS, WHILE COHABITING WITH HER HUSBAND, ARE NOT HER SEPARATE PROPERTY. SHE CAN HAVE THEM ONLY BY GIFT OF HER HUSBAND, AND SUCH A GIFT IS NOT PROTECTED AGAINST HIS CREDITORS.

Seitz v. Mitchell, 94 U. S., 580; 24 Law Ed., 179.

In the above case, the Court says:

"Nowhere, so far as we are informed, has it been adjudged that her earnings, or the product of them, made while living with her husband *and engaged in no separate business*, are not the property of the husband when the rights of his creditors have been asserted against them." Id. Law Ed. 180.

In the case at bar, Mariam A. Patterson was living with her husband and was not engaged in separate business. The mining claim in question was not inherited by nor bequeathed to her, nor acquired as a gift from her husband.

VII.

WHERE THE DEED FROM H. J. PATTERSON TO HIS WIFE SET FORTH A CONSIDERATION OF ONE DOLLAR (\$1.00), NO OTHER CONSIDERATION COULD BE PROVEN, AND IT WAS ERROR TO PERMIT INTRODUCTION OF EVIDENCE THAT MRS. PATTERSON PAID FOR THE WORK THAT WAS THE CONSIDERATION OF THE TRANSFER FROM WICKERSHAM TO PATTERSON, AND EVIDENCE AS TO THE SOURCE FROM WHICH THE MONEY WAS RECEIVED BY HER.

In *Ogden St. Bank v. Barker et al.* (Utah) 40 Pac., 765, the Court holds, in passing upon whether another or different consideration than that mentioned in the deed can be shown:

“But an entirely different consideration from that expressed cannot be shown by parol evidence, when the deed is assailed by creditors, because this would be to vary the terms of a contract, the stipulations of which were reduced to writing by the parties. In the absence of mistake or fraud, the written instrument speaks for itself, and when attacked by creditors its stipulations are conclusive as to the grantor and grantee, and the instrument cannot be supported by falsifying its recitals, because they must be presumed to have been made and accepted deliberately and to express the intention of the parties thereto. The law presumes that every man intends the necessary and natural consequences of his own acts, and where the proximate and natural results of a debtor's acts are to hinder, delay, or defraud creditors, it will be presumed that he intended his acts to produce such results. In the case at bar the consideration expressed in the deed is one dollar, and there is no other consideration mentioned or referred to in the consideration clause. The deed having been assailed by a creditor of the grantor on the ground that it was fraudulent and made to hinder and delay such

creditor in collecting his claims, its recitals were conclusive, and at the trial neither the grantor nor the grantee was entitled to show any other consideration than that contained in the instrument * * A voluntary conveyance of land made by a debtor while he is under embarrassed circumstances, is constructively fraudulent, and will be held void, as to existing creditors, without proof of actual fraud." Id. 766-767.

The Court in that case also holds that evidence to show another or different consideration than the consideration set forth in the deed cannot be considered nor regarded under the issues raised in the pleadings, and in the case at bar the Court erred in admitting or considering any evidence showing another or different consideration than that named in the deed.

VIII.

THE DEFENDANTS CONTEND THAT H. J. PATTERSON WAS IN REALITY HOLDING INTEREST IN THE GROUND IN DISPUTE, IN TRUST FOR HIS WIFE. THIS BEING THE CONTENTION, IT COULD NOT BE CREATED OR ESTABLISHED BY PAROL TESTIMONY.

Kalimowski v. McNeny et al. (Wash.), 123 Pac., 174.

IX.

THE PROVISIONS OF SECTION 560, COMPILED LAWS OF ALASKA, ARE NOT APPLICABLE WHERE THE ALLEGED FRAUDULENT TRANSACTION IS BETWEEN HUSBAND AND WIFE.

Under a law similar to the provision of the section above cited, the Supreme Court of Montana, in the case

of *Lewis v. Lindley et al.*, 48 Pac., 765, holds as follows:

"In an action to set aside a conveyance of land from husband to wife, in fraud of plaintiff's equitable rights, though the wife paid a valuable consideration, the burden was on her to show that she took without notice of plaintiff's rights; the rule causing such burden on her, not being affected by Comp. St 1887, Div. 5, Sec. 232, declaring that the provisions of the chapter (relating to conveyances) shall not impair the title of a purchaser for value, unless it appears that he had notice of the fraudulent intent of the grantor, or of the fraud, rendering the grantor's title void."

In the case at bar, it was not incumbent upon the plaintiff to establish a *prima facie* case, to prove that Mrs. Patterson had no knowledge of the fraudulent intent on the part of her husband, and the cases already cited declare such a transaction, under the circumstances of the case at bar, fraudulent, and plaintiff was not required to establish the actual fraud on the part of the defendant H. J. Patterson.

Thomson et al. v. Crane et al., C. C. Dist. of Nevada, 73 Fed., 327;

Brady et al. v. Irby (Ark.), 142 S. W., 1124;
30 A. & E. Anno. Cas., 1054;

Wilke v. Vaughan (Ark.), 83 S. W., 913.

X.

NO ASSIGNMENT WAS EVER MADE OF THE INTEREST OF H. J. PATTERSON IN THE LEASE TO HAMILTON, AND ALL ROYALTIES THAT ACCRUED TO PATTERSON WAS THE PROPERTY OF PATTERSON'S CREDITORS.

The transfer to Mrs. Patterson was of the bare legal

title to the ground and the deed did not contain the ordinary clause transferring the "*rents, issues and profits*," and this provision being omitted, it can only be presumed that they were intentionally omitted, and as between the grantee and the creditors of grantor, we respectfully submit that any doubt should be resolved in favor of the creditors, especially in view of the suspicious circumstances surrounding the transaction and the gross inadequacy of the alleged consideration.

It conclusively appears that, taking grantor's own statements as true, all the moneys that were advanced by Mrs. Patterson for the purpose of doing the assessment work on the DALY BENCH in 1910, amounting to the sum of *one hundred dollars*, and the other one hundred and twenty-five dollars advanced by her was, under the terms of the contract between Patterson and Wickersham, *expended by said Patterson in prospecting the lay or lease he held on the ground*, and if anything, was a *loan* to him; that Patterson afterwards expended over *fourteen hundred dollars* on the lay, partially before he assigned it to Hamilton, and that he *continued expending money thereon for some two months after said assignment*, and as far as the record shows, Patterson expended at least *fifteen hundred and twenty-five dollars* on the lay, developing it and preparing the ground for work, as against the *one hundred dollars* alleged to have been advanced by Mrs. Patterson. They now ask that all the royalties now impounded in the District Court in Fairbanks, Alaska, amounting to *fifty-one hundred seventy-four and sixty-six one-hundredths dollars*, be

turned over to Mrs. Patterson as her money by reason of her expenditure of *one hundred dollars*, and that the creditors of said Patterson, who were lured into giving credit to Patterson, partially at least, upon the strength of his supposed ownership of an interest in the DALY BENCH, get nothing for the *fifteen hundred and twenty-five dollars* expended by Patterson.

Mrs. Patterson took the bare legal title, subject to the burdens then existing against it, to-wit, the payment of the royalties thereafter to accrue to the grantor, her husband.

Without in any manner waiving the point heretofore made in Par. VII., that the court erred in admitting or considering any evidence as to any other consideration for the alleged fraudulent deed other than that recited therein, to-wit, the sum of one dollar, yet appellant submits that, even if the objectionable testimony had been properly admitted, that the order of dismissal was erroneous, as the defendants failed to establish the essential elements of their defense: (a) good faith on the part of grantor (b) good faith in receiving the transfer on the part of the grantee, and lack of knowledge that the transfer was fraudulent and was intended to defraud or hinder grantor's creditors; (c) that grantee had paid a *valuable* and *adequate* consideration for said property; (d) that grantee had so conducted herself as not to mislead her husband's creditors, and (e) that her actions were not such as to constitute a dedication to her husband's creditors of whatever interest she may have had in the property.

It is submitted that the burden of proving the above matters cast upon the grantee is not met by the promiscuous admission of testimony of Patterson of statements alleged to have been made to, and supposed conversations had with, his wife, Judge Wickersham, and Craig the drill-man, all self-serving, and not overly burdened with the earmarks of probability, and, in our humble opinion, not susceptible of being "squared" with the physical and record facts, which latter were criterions by which his creditors could judge Patterson as a credit risk.

Truth is sometimes elusive when it relates to transactions between man and wife, especially when the man sees bankruptcy approaching and it becomes necessary to sequester a valuable asset to provide comforts along the financial pathway of the future until the overly-trusting creditors have had an opportunity to forget, or to become occupied in prying loose a few dollars from some other equally enterprising debtor imbued with the philosophy of that ever-growing school who believe in "letting the other fellow worry." Paradoxical as it may seem in this year of grace 1914, a woman's skirt is wide enough to effectually screen from view the acts and details relative to the change of title to a twenty-acre mining claim.

It is further respectfully submitted that the defendants have not established by clear, satisfactory or convincing testimony that the money that was used to pay for the assessment work on the DALY BENCH in 1910 was the property of Mrs. Patterson, and the story of

the manner in which she came to have money in bank is not such as would appeal to a court of equity, especially in view of the fact that the alleged note given by Hosler and Patterson turns up most opportunely in the possession of defendants; also that the principal evidence relied upon by the defendants to establish that the title to the ground in dispute was held in trust by Patterson for his wife consisted of self-serving declarations such as could not be contradicted by the plaintiff, and were used for the purpose of contradicting or varying the many contrary statements formerly made by Patterson in his various declarations in writing relative to the ownership of the mining property; and that he apparently succeeded in creating from thin air a title that was of greater dignity than that created by written instruments, duly recorded in order that his various creditors might ascertain his probable value as a credit risk.

Under the Code of Alaska, provision is made for recording instruments affecting title to real estate, and the various instruments affecting title, when once recorded, are presumed to be notice to the world of the contents thereof, and Mrs. Patterson was charged with full knowledge of his assertions of ownership, and as she acquiesced therein by her silence, she dedicated whatever interest she had in the property (if she ever had any) to the purposes for which her husband was so successfully using it, viz.: to get credit with laborers and merchants and to guarantee the fulfillment of the terms of his lease from his co-owner on the balance thereof.

As far as counsels' investigations have progressed,

we find no adequate means furnished by the machinery of the courts, or by the statutes of Alaska, for ascertaining the terms and conditions of clandestine agreements between husbands and wives, by the terms of which, if permitted to prevail, written titles are nullified, the recording laws become a mockery, and a court of equity, a clearing house for fraud. If this be equity, then the laws relative to the establishing and perpetuating of land titles in Alaska will be valueless so far as the transactions between husband and wife are concerned. Should the principle contended for by the defendants and given countenance by the order of the Court in the case at bar, a principle so iniquitous in its inception and so harmful in practice, be permitted to stand, no married man's credit based upon property holdings alone, nor bond given by him based upon property qualifications, as prescribed by law, would be other than a trap for the unwary; and if the married man chanced to be dishonest, deeds from and liens or mortgages upon real estate of a married man, who holds record titles to property, might become completely valueless should the wife of the grantor or mortgagor, with the connivance of the husband, see fit at any time in the future to assert title to said property, claiming that same was merely held in trust for her by her husband, and that she was the real owner thereof.

It is respectfully submitted that the rulings of the Court in the case at bar in the particulars hereinbefore assigned as error, are contrary to the principles of equity and the dismissal of the action was not justified by

the evidence.

Wherefore appellant prays that this appeal be allowed and the case be reversed.

McGOWAN & CLARK,

Attorneys for Appellant.

Dated Fairbanks, Alaska,

August, 1914.

No. 2411.

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

EDWARD STROECKER, as Trustee of the
Estate of H. J. Patterson, a Bankrupt,
Appellant,

vs.

MARIAM A. PATTERSON and H. J.
PATTERSON,
Appellees.

BRIEF ON BEHALF OF APPELLEE

A. R. HEILIG,
Fairbanks, Alaska,
Attorney for Appellee Mariam A. Patterson.

Filed this..... day of September, 1914.

Filed
..... Clerk.
SEP 29 1914

By Deputy Clerk.
F. D. Mancini,
Clerk.

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BRIEF ON BEHALF OF APPELLEE
MARIAM A. PATTERSON

The property in controversy in this action is an undivided quarter interest in the Daly Bench placer mining claim on Eva Creek, in the Fairbanks Recording District, Alaska, and the royalties which accrued to said interest from mining operations carried on by H. C. Hamilton, lessee, after November 27, 1911.

Appellant contends that said quarter interest and royalties were the property of H. J. Patterson when he was adjudged bankrupt.

The appellee Mariam A. Patterson claims that H. J. Patterson, her husband, never was the real owner of

that property; that she purchased it with her own money, through her husband, and is entitled to the property and the royalties.

Appellant's principal witness was H. J. Patterson. Appellant, the plaintiff below, having thus vouched for his credibility, the witness testified very clearly that the money invested in the land was his wife's separate property; that he himself did not invest anything therein; that he took title to the property in his own name on November 10, 1911, without her knowledge and contrary to her wishes; that as soon as he got the deed she asked him to convey the property to her (Tr. p. 98), which he did seventeen days thereafter.

No estoppel was pleaded, and it does not appear that any of H. J. Patterson's debts were incurred during the time that the legal title to the property stood in his name.

"The judgment debtor having put nothing into the property, his creditors can take nothing out of it."

Gladstone Lumber Co. v. Kelly, 129 Pac., 763.

On September 19, 1910, James Wickersham owned the whole of the Daly Bench. On that day he agreed with H. J. Patterson to convey to him a quarter interest in the property, and the latter agreed to sink a hole upon the premises and to do the assessment work for the year 1910 without any expense to Wickersham (Tr. p. 48). This was the agreed purchase price for the quarter interest. At the same time Wickersham leased the claim to H. J. Patterson on condition that he would work steadily and continuously on the premises. This lease

was forfeited for breach of this condition (Tr. p. 49). But the purchase price for the quarter interest was paid, and in recognition thereof Wickersham made a deed of it to H. J. Patterson, dated October 14, 1911, but delivered November 10, 1911 (Tr. p. 61). However, the purchase price was not paid by H. J. Patterson, but by his wife, Mariam A. Patterson (Tr. p. 56). After H. J. Patterson had made his agreement with Wickersham, he made an agreement with his wife that if she would pay for the sinking of the hole and doing the assessment work for 1910 with her own funds, she should have the quarter interest (Tr. pp. 55, 57). To this she assented and paid the sum of \$225 for doing the work, out of her own money, which she had originally received as proceeds of a mining claim located by her in the Yukon Territory (Tr. p. 53). She loaned part of this money to her husband and his partner, Hosler, in 1905, taking a note for it (Tr. p. 53), which was subsequently paid and the proceeds deposited in her bank account (Tr. p. 75), upon which she drew the check for \$225 that paid for the work done to purchase the quarter interest (Tr. p. 57). When Wickersham was about to execute the deed for this quarter interest, these facts were known by him, and he was requested by H. J. Patterson to make the deed to his wife because she had paid for it (Tr. pp. 62, 80); to this Wickersham objected, since the writings had been made with the husband, but suggested that the husband take the deed and then convey the property as he wished. This he did in 17 days after he got the deed, and then transferred the legal title thus

vested in him to his wife in performance of his prior parol agreement with her, and her performance of its conditions and the conditions of the agreement with Wickersham (Tr. p. 65).

The statute of frauds therefore has no application.

Sproul v. Atchison Nat. Bank, 22 Kan., 340.

Cresswell v. McCaig, 9 N. W., 52.

A careful scrutiny of the testimony will show that there is not a particle of evidence tending to prove that any creditor of H. J. Patterson gave him a dollar's worth of credit on the faith of his being the actual owner of this property, or of his having the agreement with Wickersham. The work he did on this property, under the lease from Wickersham, was all paid for with his own money. There is no evidence that any creditor was deceived by the fact that the legal title stood in H. J. Patterson's name from November 10, 1911, to November 27, 1911. E. R. Peoples testifies for plaintiff that about twelve days after the conveyance from Wickersham to H. J. Patterson he learned that fact, but all he asked the latter to do was to give him security upon the land for a debt already owing (Tr. p. 107).

Hence the wife has not estopped herself from claiming the property.

Hews v. Kenney, 62 N. W., 204.

When H. J. Patterson made said agreement with his wife, about September 19, 1910, he owed nobody (Tr. p. 74). At that time the Daly Bench had no known value. No paystreak had yet been discovered on the property and the wife's investment was a speculation.

Her husband at that time had money of his own (Tr. p. 55), but he wanted to use it in carrying on mining operations, and not in purchasing the property.

When Wickersham delivered to H. J. Patterson a deed to the quarter interest, he also gave him another lease on his, Wickersham's remaining three-fourths of the claim. This lease H. J. Patterson subsequently transferred to H. C. Hamilton, and at the same time, November 27, 1911, he gave Hamilton a lease on the quarter interest, the legal title to which then stood in his, Patterson's name, upon a royalty of five per cent of the gross output; thereafter H. J. Patterson conveyed the legal title to the quarter interest to his wife. This conveyance of the reversion entitled her to the rents and royalties subsequently accruing.

In re Owsley's Estate, 142 N. W., 134.

West Shore Mills Co. v. Edwards, 33 Pac., 987.

Tiffany on Real Property, secs. 47, 360.

24 Cyc., 1172.

11 Am. & Eng. Enc. Law (2d ed.), 841.

At the time of the conveyance from Patterson to his wife, nothing had been found on the Daly Bench, and its value was a guess (Tr. p. 32). Pay had been found on the "Happy Home" claim adjoining, but the owners of that claim did not believe that any substantial part of that pay extended into the Daly Bench (Tr. p. 32). Wichman was one of the owners of the "Happy Home," and for this reason they compromised their claim to the whole of the Daly Bench by accepting a 75-foot strip thereof and relinquishing their claim to the balance (Tr. p. 32).

Under his lease from Wickersham, H. J. Patterson did some work on the claim, but found nothing, and then transferred the lease to Hamilton, while he, Patterson, went to mining on Engineer Creek, where he incurred the debts which caused his bankruptcy.

During the trial the principal exceptions by plaintiff were to the ruling of the Court permitting liberal cross-examination of his witness, H. J. Patterson. Appellee contends that the rulings of the Court were proper. Plaintiff endeavored to show by the witness that Mariam A. Patterson was not a bona fide holder for value prior to the adjudication in bankruptcy, and the cross-examination was directed to bring out the actual consideration Mariam A. Patterson gave for the property.

However, a defendant may show that the plaintiff has no cause of action by cross-examination of the plaintiff's witness.

Ah Doon v. Smith, 34 Pac., 1093.

But even if the Court relaxed the rule and allowed the cross-examination to extend to other matters pertinent to the issue, judgment would not be reversed for that reason.

Wills v. Russell, 100 U. S., 621; 25 L. ed., 607.

The evidence shows, without contradiction, that Mariam A. Patterson owned a mining claim in the Yukon Territory; worked it a while and then sold it; loaned part of the proceeds to a partnership composed of her husband and one Hosler; took their note, which was subsequently paid and the proceeds deposited in her bank account; with \$225 of this she purchased the quarter interest from Wickersham through her husband. Being

property owned by her, her husband had no such interest in it as would make her or her property liable for his debts.

Compiled Laws of Alaska, Sec. 439.441.443.489.490.560

Plaintiff did not attempt to show that Mariam A. Patterson in any manner participated in the alleged fraud of her husband, or that she had the remotest idea that in transferring the legal title to the quarter interest to her, her husband intended to defraud his creditors, or to do anything else than carry out the agreement he had made with her when she paid the purchase price of the property. It was necessary for plaintiff to show that she participated in such intent, if there was any.

Atkinson v. McNider, 105 N. W., 504. *Lane & Myers* 14

Bush v. Export Storage Co., 136 Fed., 918.

Holt Manfg. Co. v. Bennington, 132 Pac., 30.

Mrs. Patterson wanted the deed made direct to her from Wickersham, and her husband tried to have this done; as soon as she learned that he had received the deed she asked him to convey the title to her (Tr. p. 98). This he did in 17 days thereafter. Her failure to immediately enforce her husband's promise does not estop her from relying on the deed in execution of the promise.

Blake v. Meadows, 30 L. R. A. N. S., 1.

Where a man purchases land with money derived from the separate estate of his wife, though he may take title in his own name, she is equitably the owner, and a subsequent conveyance of the land by the husband to the wife cannot be assailed by his creditors.

14 Am. & Eng. Enc. Law (2d ed.), 258.

Martin v. Remington, 76 N. W., 614.

Hews v. Kenny, 62 N. W., 204.

Kemp v. Folsom, 43 Pac., 1100.

Garner v. Second Nat. Bnk., 151 U. S., 420; 14 Sup Ct., 390.

Gehres v. Wallace, 80 Pac., 273.

Wright v. Wright, 89 N. E., 789.

Farnham v. Trussell, 10 N. W., 20.

Note page 256, Vol. 127, Am. St. Rep.

20 Cyc., 375.

Mrs. Patterson was the equitable owner from September 22, 1910, when she completed payment of the purchase price of the land. The transfer to her by the holder of the legal title on November 27, 1911, although without pecuniary consideration, is not a voluntary conveyance nor fraudulent as to creditors.

Stanton v. Crane, 58 Pac., 54.

Patterson did not sell the land to his wife, neither was he indebted to her when the agreement and the deed were made. But at a time when he was solvent he had the opportunity to buy the quarter interest; he gave this opportunity to his wife; she bought with her own money; the deed was made to him when it should have been made to her; she promptly asked for a deed from him (Tr. p. 98) and he gave it to her. She was therefore the equitable owner of the land by reason of her moneys having paid for it, and the conveyance of the title to her by her husband was not voluntary, but upon good consideration.

Schreyer v. Scott, 134 U. S., 406; 10 Sup. Ct., 579.

Bigelow on Fraudulent Conveyances, p. 558, note.

And when Patterson conveyed the legal title to his wife because she had performed the conditions of the agreement between him and her and the conditions of the Wickersham agreement (Tr. p. 65), such act cannot be deemed fraudulent.

Cottrell v. Smith, 18 N. W., 865.

The property in controversy was conveyed to Mariam A. Patterson November 27, 1911; the grantor, H. J. Patterson, was adjudged bankrupt on April 16, 1912, upon his own petition filed that day; the plaintiff proceeded against defendant under the provisions of section 70e of the National Bankruptcy Act; he could not recover if the evidence showed that Mariam A. Patterson was a bona fide holder for value prior to the date of the adjudication. We submit that the Court below was right in holding that plaintiff was not entitled to the relief claimed in his complaint.

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Attorney for Appellee Mariam A. Patterson.

Dated Fairbanks, Alaska,

September, 1914.

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